Supreme Court, U.S.
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No. 00-297

In The

Supreme Court of the United States

LIVINGSTON DOWNS RACING ASSOCIATION, INC.,
Petitioner,

v.

LOUISIANA STATE RACING COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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REASON FOR DENYING WRIT

This court should deny the petition for writ of certiorari because the Louisiana Supreme Court did not decide any important question of federal law in a way that conflicts with relevant decisions of this Honorable Court.

STATEMENT OF THE CASE

1. Introduction to Facts

This is an action against the Louisiana State Racing Commission ("Racing Commission") arising from the revocation of a license issued to Livingston Downs Racing Association ("Livingston Downs") to operate a racetrack under La. Rev. Stat. Ann. § 4:158.[1]

The Racing Commission is an agency created and assigned to the executive branch of Louisiana government by statute.[2] Its charge is to regulate horse racing for pari-mutuel wagering through licensing of racetracks, horse owners, trainers and the like and the promulgation and implementation of regulations and conditions for the operating of all racetracks in Louisiana.[3]

The law controlling horse racing in Louisiana is found in Title 4, Chapter 4 of the Louisiana Revised Statutes of which Part 1 contains the provisions for the licensing of a race meeting. Section 147 sets out the

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[1] A copy of the relevant state statutes has been reproduced for the Court's convenience and attached hereto as ***Appendix B***.

[2] ***Appendix B***, La. Rev. Stat. Ann. §§ 4:141 *et seq.*, 36:4(A) and 36:109.

[3] ***Appendix B***, La. Rev. Stat. Ann. §§ 4:147 and 4:148.

requirements to be included in an application, and Section 159 illustrates some of the criteria to be considered by the Racing Commission in determining whether to grant a license.

A person desiring to conduct horse racing in Louisiana where no racing was previously conducted must obtain approval from the parish in which the racetrack will be situated in a referendum election after application and approval by the Racing Commisson.[4]

After voter approval in a parish wide referendum election where the racetrack will be situated, a qualified applicant may apply to the Racing Commission for a one (1) year or ten (10) year license to conduct race meeting(s) which license sets forth the name of the licensee, the location of the racetrack and the dates of the race meet.[5]

2. Statement of Facts

On October 26, 1992, Livingston Downs Racing Association, Inc. applied to the Racing Commission for a license to conduct horse racing in Livingston Parish. Horse racing had not previously been conducted in Livingston Parish.

The application was considered by the Racing Commission at its meeting in December 1992. The application was approved over objection of other interested parties.[6]

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[4] ***Appendix B***, La. Rev. Stat. Ann. § 4:181.

[5] ***Appendix B***, La. Rev. Stat. Ann. § 4:158.

[6] Livingston Downs application came for hearing before the Racing Commission in December 1992.The Racing Commission conducted a hearing on the application at its December 1992 meeting. Livingston Downs made presentation

Following a favorable referendum election, Livingston Downs, through its promoter Al Ransome, returned to the Racing Commission at each meeting thereafter seeking approval for additional permits and licenses. These Commission meetings were held in January 1993, April 1993, May 1993, August 1993, December 1993 and January 1994.[7]

First, Livingston Downs made application for racing dates and a race meet under La. Rev. Stat. Ann. § 4:158. It did not, at the time of application, have a racetrack on which to conduct the meet. However, Mr. Ransome made a lengthy presentation to the Racing Commission in May 1993 citing the need to obtain dates in order to secure financing.[8]

The request for racing dates was approved.

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in support of the application. The application was opposed by: Jefferson Downs, Fair Grounds, Louisiana Downs, New Evangeline Downs and Delta Downs, four of whom were licensed as racetracks. These entities challenged the issuance of the license to Livingston Downs by suing the Racing Commission in district court. *Jefferson Downs v. Louisiana State Racing Commission*, No. 92-20961, Division "G", Civil District Court for the Parish of Orleans, State of Louisiana. The trial court found in favor of petitioners and vacated the license. The Racing Commission appealed the decision to the Louisiana Fourth Circuit Court of Appeal who reversed and reinstated the license granted to Livingston Downs. *Jefferson Downs Corporation, Inc. v. Louisiana State Racing Commission*, 637 So.2d 1279 (La.Ct.App. 4th Cir. 1994); see La.Rev.Stat. 49:964.

[7] ***Pet. Appendix M***, p. 38, Apr. '94 Trans., Racing Comm'n Meeting.

[8] ***Pet. Appendix M***, p. 39, Apr. '94 Trans., Racing Comm'n Meeting.

Livingston Downs did not then, nor has it since, begin construction of a racing oval, backside barns or grandstand area for a racetrack.

Still, Livingston Downs returned to the Racing Commission making application for off-track wagering.

After the enactment of La. Rev. Stat. § 4:149.2, the Racing Commission was permitted to allow racetracks licensed in Louisiana to accept wagers on races conducted at out-of-state tracks, "simulcast wagering".

The Racing Commission was subsequently authorized by La. Rev. Stat. Ann. § 4:211 *et seq.* to license off-track wagering facilities. An off-track wagering facility is a satellite betting parlor which stands alone from the racetrack and/or grandstand and accepts wagers on any or all races on which the licensed racetrack accepts wagers. However, under La. Rev. Stat. Ann. § 4:211(5) only a licensee operating a racetrack in 1986-1987 may apply for a license to operate an off-track wagering facility in Louisiana. Even still, a qualified licensee may not be licensed to conduct off-track wagering unless it conducts live horse racing not less than eighty (80) days within a twenty week period. La. Rev. Stat. Ann. § 4:214.1.

Livingston Downs did not qualify as a primary licensee for off-track wagering because it did not operate a racetrack in 1986-87. Even assuming it did, it did not have a racetrack to conduct live horse racing at the time of its application or receive simulcasting.

Livingston Downs' application for an off-track wagering license was, therefore, denied.

Eighteen months went by, but there was no racetrack in Livingston Parish. During this time though, Livingston

Downs contended that financing was imminent and construction was set to begin.[9]

The Racing Commission gave notice to Livingston Downs by certified letter to Mr. Ransome and two separate subpoenas that Livingston Downs' eligibility to retain its license in the face of its apparent difficulty to bring a racetrack to Livingston Parish would come for hearing on April 29, 1994 in New Orleans before the Commission.

During the April meeting, Livingston Downs disclosed numerous and apparently insurmountable obstacles which prevented its constructing and opening a racetrack in the foreseeable future, not the least of which was that Livingston Downs had still not acquired the land on which the track was to be situated:

> The title problems have – and we have prudently not purchased the property until all these problems are resolved.[10]

According to Livingston Downs' attorney, these title problems purportedly evolved from environmental concerns raised by potential investors because the proposed site was located across the street from a former solid waste facility closed by the EPA. Further complicating the issue, the property was owned by a succession one of whose heirs was in bankruptcy and the savings and loan which held the mortgage on the property was being

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[9] ***Pet. Appendix M***, pp. 70, 83, Apr. '94 Trans., Racing Comm'n Meeting.

[10] As spoken by Livingston Downs attorney. ***Pet Appendix M***, p. 47, Apr. '94 Trans., Racing Comm'n Meeting.

administered by the Resolution Trust Corporation (RTC).[11]

Considering the foregoing and other testimony and evidence presented during the hearing, the Racing Commission revoked the ten year license issued to Livingston Downs finding that it could not meet its obligations under the license.[12]

Still even as it was compelled to revoke the license, the Racing Commission did not foreclose the opportunity to Livingston Downs to own and operate a racetrack in Livingston Parish:

> Let it be understood, there is no doors closed to Mr. Ransome or anyone to apply for a license to run a racetrack before the Commission.[13]

Subsequent discussion by the Racing Commissioners reveal the Commission's continued commitment to licensing Livingston Downs when it was able to show the financial wherewithal to construct a racetrack and conduct a race meet.[14]

The hearing concluded when the attorney for Livingston Downs announced to the Racing Commission that a petition for trial de novo and suspensive appeal was already filed in district court for Livingston Parish

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[11] ***Pet. Appendix M***, p. 45, Apr. '94 Trans., Racing Comm'n Meeting.

[12] ***Pet. Appendix M***, p. 75, Apr. '94 Trans., Racing Comm'n Meeting.

[13] As spoken by Chairman of the Racing Commission, ***Pet. Appendix M***, p. 78, Apr. '94 Trans., Racing Comm'n Meeting.

[14] ***Pet. Appendix M***, pp. 78-81, Apr. '94 Trans., Racing Comm'n Meeting.

suspending the Racing Commission decision to revoke Livingston Downs' license.[15]

3. Procedural History

On April 29, 1994, Livingston Downs filed a petition for trial de novo and suspensive appeal in the Louisiana Twenty-first Judicial District Court for Livingston Parish under La. Rev. Stat. Ann. § 4:158 appealing the revocation of its license by the Racing Commission at its meeting in New Orleans on that day. The suit was thereafter transferred to Louisiana Civil District Court for the Parish of Orleans.[16]

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[15] ***Pet. Appendix M***, p. 84, Apr. '94 Trans., Racing Comm'n Meeting.

[16] The Racing Commission excepted to venue in Livingston Parish under La. Rev. Stat. Ann. § 4:145.1 which provides Civil District Court for the Parish of Orleans is the exclusive venue for suits against the Commission. The trial judge overruled the exception. The Commission appealed on writ application to the Louisiana First Circuit Court of Appeal. The writ was denied. *Livingston Downs Racing Ass'n v. La. State Racing Comm'n*, No. 94-CW-2229, 654 So.2d 1372 (La.Ct.App. 1st Cir. 2/24/95). The denial was appealed to the Louisiana Supreme Court who reversed the trial court and transferred the matter to Civil District Court citing La. Rev. Stat. Ann. § 4:145.1 but offering no other opinion. *Livingston Downs Racing Ass'n v. La. State Racing Comm'n*, No. 95-CC-0749, 655 So.2d 1340 (La. 4/28/95). Pursuant to the local rules of Civil District Court No. 7, the case was assigned to Division "G" and consolidated with *Jefferson Downs v. La. State Racing Comm'n*, No. 92-20961. Subsequently, the trial court dismissed the suspensive appeal. The Louisiana Fourth Circuit Court of Appeal reinstated the suspensive appeal by reversing the trial court and remanding it for further proceeding. ***Pet. Appendix J***, *Livingston Downs Racing Ass'n, Inc. v. La. State Racing Comm'n*, No. 96-C-1215, 675 So.2d 1214 (La.Ct.App. 4th Cir. 6/5/96).

After the petition was set for trial on the merits, the parties entered into a Consent Judgment on November 15, 1996. Under the terms of the Consent Judgment, the trial was continued without date, and the proceedings were stayed until October 31, 1998. Also, the license issued to Livingston Downs was suspended until that time pending satisfaction by Livingston Downs of certain terms and conditions outlined in the Consent Judgment, the most important of which was to obtain a commitment for or financing for the racetrack in Livingston Parish.

When Livingston Downs still could not secure financing for the track after the two additional years, a motion to dismiss the petition was filed pursuant to the terms of the Consent Judgment entered into between the parties.[17]

Livingston Downs appealed the dismissal to the Louisiana Fourth Circuit Court of Appeal. The court of appeal rendered an opinion affirming the trial court but echoed the Racing Commission that the decision does not foreclose a subsequent application by Livingston Downs.

An application for rehearing to the Fourth Circuit Court of Appeal *en banc* was summarily denied, and the Louisiana Supreme Court similarly denied Livingston Downs' writ application.

ARGUMENT

Livingston Downs comes before this Honorable Court complaining of "a state agency's blatant trampling

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[17] ***Pet. Appendix H,*** Consent Judgment.

of a private citizen's rights of due process and equal protection under the U.S. Constitution."[18]

Where is the trampling of due process and equal protection? Livingston Downs asked for a license to operate a racetrack; it was granted. Livingston Downs asked for racing dates; it was granted. Livingston Downs promised to build a racetrack. It did not.

Livingston Downs' rights of due process and equal protection have been exercised both at the administrative level before the Racing Commission and on judicial review to the court beyond a point of exhaustion and on the edge of abuse.

Livingston Downs' grievance cannot be that it has not been afforded all due process and equal protection. It has done nothing since first receiving its license but engage itself, the Racing Commission, individual Commissioners and others in extensive and exhaustive litigation.[19]

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[18] *Petition*, p. 2.

[19] A history, only in part, of some of the litigations filed and sustained by Livingston Downs over the past eight years: *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*, La.M.D. 96-3430, still pending; *Livingston Downs v. La. State Racing Comm'n*, Louisiana Civil District Court Parish of Orleans State, No. 97-12435 for off-track wagering, petition dismissed and appealed to Louisiana Fourth Circuit Court of Appeal No. 98-1229, 727 So.2d 644 (1999); *Livingston Downs Racing Ass'n v. Louisiana*, Louisiana Nineteenth Judicial District Court for East Baton Rouge Parish, No. 399,563 petition for declaratory order, appealed to Louisiana First Circuit Court of Appeal, No. 94-1514, 653 So.2d 1311, *rev'd in part* 705 So.2d 149 (1997), *reh'g denied* (12/2/97); also appeal transferred to Louisiana First Circuit Court of Appeal by Louisiana Supreme Court, No. 96-2153, 678 So.2d 535 (1996); *Livingston Downs Racing Ass'n v.*

The Racing Commission's regulatory action, sustained by the Louisiana courts, is not the cause or source of Livingston Downs' inability to construct a racetrack. The inability is an independent financial reality wholly unrelated to the regulatory actions.

The Racing Commission issued a license to Livingston Downs in good faith and the expectation that Livingston Downs possessed the ability to open and operate a racetrack in Livingston Parish. The license was revoked when it became obvious that Livingston Downs' representations were mere aspirations.

Even still, the Racing Commission remained committed to Livingston Downs. And, the Racing Commission agreed to suspend Livingston Downs' license for two years under the terms of the Consent Judgment to allow it yet two additional years to secure adequate financing.

Louisiana, Louisiana Nineteenth Judicial District Court for East Baton Rouge Parish, No. 413,022 c/w 399,563, *Livingston Downs Racing Ass'n v. La. Racing Comm'n*, Louisiana Twenty-first Judicial District Court for Livingston Parish, No. 71, 137, appealed to Louisiana First Circuit Court of Appeal, No. 94-2229, 654 So.2d 1372, *writ denied* to Racing Commission, *writ granted* by Louisiana Supreme Court No. 95-0749, 655 So.2d 1340 (1995) case transferred, *reh'g not considered* No. 95-0749, 656 So.2d 1008 (1995); *Livingston Downs Racing Ass'n v. Krantz*, Louisiana Twenty-first Judicial District Court for Livingston Parish, No. 68,608, appealed to Louisiana First Circuit Court of Appeal No. 95-1217, 664 So.2d 103 (1995) suit dismissed, *writ denied* No. 95-1996, 665 So.2d 389 (1995); *Livingston Downs Racing Ass'n v. Committee to Control Gambling*, Louisiana Twenty-first Judicial District Court Livingston Parish, No. 68, 605 Div. "C", appealed to Louisiana First Circuit Court of App. No. 93-2136, 641 So.2d 2 (1994), appealed to Louisiana Supreme Court No. 94-0304, 633 So.2d 158 (1994).

Finally, the Louisiana Fourth Circuit Court of Appeal acknowledged, even after affirming the dismissal of Livingston Downs suit, that nothing precludes Livingston Downs from reapplying for a license, presumably assuming Livingston Downs secures financing.

Livingston Downs does not have a license issued by the Racing Commission to conduct horse racing in Louisiana because there is no racetrack, racing oval, backside barns or grandstand to conduct a race meet assuming it ever acquired the land on which the racetrack was to be built.

In all events, this cause does not present any important federal question to be decided because there is no federal question raised.

On appeal to the Supreme Court, petitioner does not complain that the due process provided under Louisiana state law is inadequate.

Livingston Downs does not complain that the due process available under state law has been applied unconstitutionally to Livingston Downs.

The complaint, plainly stated, is that the due process guarantees and equal protections afforded by state law were *not* applied correctly to Livingston Downs.[20]

The Louisiana Fourth Circuit Court of Appeal found that they were. The Louisiana Supreme Court did not consider otherwise.

Because the case does not present any federal question, this opposition will first consider Livingston Downs' plea for the court's jurisdiction under 28 U.S.C. § 1257.

Next, the opposition will present the merits of the decision based upon state law from which this appeal

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[20] ***Petition***, p. 14.

arises. The matter comes on application to the Supreme Court from a decision of the Louisiana Supreme Court to deny writ application to review a decision of the Louisiana Fourth Circuit Court of Appeal. The appeal court found in favor of the Racing Commission applying the plain provisions of the Consent Judgment entered into by Livingston Downs.

Finally, this opposition will address Livingston Downs' arguments of due process and equal protection relating to the initial revocation of its license notwithstanding a decision of the court that those issues were laid to rest by the Consent Judgment.

1. There Is No Federal Question At Issue Under 28 U.S.C. § 1257 To Convey Jurisdiction

Livingston Downs invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257.

28 U.S.C. § 1257 provides for review by the United States Supreme Court on *writ of certiorari* of the highest court of a State for any one of three reasons:

(1) the validity of a treaty or statute of the United States is drawn in question, or

(2) where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or

(3) where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Initially, a cursory review of petitioner's application reveals no grounds for invoking jurisdiction under 28 U.S.C. § 1257.

Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1979), involved an action by a licensed horse trainer of the New York State Racing and Wagering Board challenging the constitutionality of a statute authorizing the summary suspension of his racing license without a pre-suspension hearing. Under the state statute, the trainer was entitled to a post-suspension hearing but there were no delays set by statute guaranteeing the hearing would take place promptly. The licensee did not attempt to avail himself of the procedures for a post-suspension hearing, but challenged the *inadequacy* of the remedy under the Fourteenth Amendment in federal district court. The Supreme Court upheld the constitutionality of the statute allowing for summary suspension of a horse trainer's license without a pre-suspension hearing, property interest notwithstanding, but found the suspension constitutionality infirm because there was no guarantee of a meaningful and prompt post-suspension hearing.

Unlike *Barry*, Livingston Downs does not challenge the due process and equal protection afforded by Louisiana but the results obtained.

Livingston Downs specifically acknowledges that the issue presented is "not whether the procedural safeguards put into place by the State of Louisiana to prevent governmental deprivation of property without due process of law are sufficient". Rather, Livingston Downs claims an error in the application or failure to apply procedural protections in place which are purely issues of state law.[21]

Further, there must be both a federal question raised and decided by the highest state court to review by the

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[21] ***Petition***, p. 14.

Supreme Court in the absence of which there is no jurisdiction. A point neither appealed nor decided is not properly before the Supreme Court.[22]

The Supreme Court has no supervisory jurisdiction over state courts and, in reviewing state court judgment, is confined to evaluating it in relation to the Federal Constitution.[23]

Livingston Downs has not, until now, objected to the revocation of its license or review by Louisiana state courts under the Fourteenth Amendment of the United States Constitution or under similar guarantees provided by the Louisiana Constitution, for that matter.

The cause comes before the Supreme Court from a state court judgment dismissing Livingston Downs' pending petition pursuant to the terms of a Consent Judgment entered into between the Racing Commission and Livingston Downs.[24]

Issues presented for review on appeal of this decision to the Louisiana Fourth Circuit Court of Appeal were restricted to the application and interpretation of state law, for example: (1) whether the Commission, as an administrative agency, is required to comply with the provisions of the Open Meeting Law; (2) whether the Commission's motion to dismiss is a violation of the Open Meeting Law; (3) whether the Commission, as an administrative agency, is required to comply with the

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[22] *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976).

[23] *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981).

[24] ***Pet. Appendix H***, Judgment, Louisiana Civil District Court for the Parish of Orleans.

provisions of the Administrative Procedure Act; and (4) whether the Commission's motion to dismiss is a violation of the Administrative Procedure Act.[25]

On subsequent application of *writ of certiorari* to the Louisiana Supreme Court, Livingston Downs assigned thirteen different assignment of errors, two of which loosely claim that its due process rights were violated because the Louisiana Fourth Circuit Court of Appeal decided the case on an "incomplete" record. It never raises any issue of equal protection.[26]

These assignments of error, however, were premised upon the argument that the issue before the court was the attendant due process of the initial revocation of license.[27]

However, the original petition for trial de novo and for suspensive appeal did not allege the license was revoked without due process, but that the decision to revoke was made without "just cause" under La. Rev. Stat. Ann. § 4:160. This is a factual determination which was rendered moot when the parties entered into the Consent Judgment.

Furthermore, the decision of the Louisiana Fourth Circuit Court of Appeal rested upon an interpretation and enforcement under state law of the Consent Judgment.

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[25] ***Appendix C***, p. 11, Livingston Downs, Appellant Original Brief to Louisiana Fourth Circuit Court of Appeal.

[26] ***Appendix E***, p. 14, Livingston Downs, Petition for *Writ of Certiorari* to Louisiana Supreme Court.

[27] ***Appendix E***, Livingston Downs, Petition for *Writ of Certiorari* to Louisiana Supreme Court.

The Louisiana Supreme Court denied Livingston Downs' application to review the Louisiana Fourth Circuit Court of Appeal decision.[28]

Thus, even to the extent Livingston Downs ever alleged any Fourteenth Amendment claim, the case was decided and supported by the application of state law.

2. Louisiana State Court Properly Decided Case On Terms Of Consent Judgment

This opposition turns now to discuss the Louisiana Fourth Circuit Court of Appeal decision which the Louisiana Supreme Court declined to review on application of *writ of certiorari*.

The Louisiana Fourth Circuit Court held on appeal that the trial court was not clearly wrong in finding the conditional commitment for collateralized financing submitted by Livingston Downs did not comport with the requirements of the Consent Judgment, thus, requiring the case be dismissed.[29]

Livingston Downs petition for trial de novo and for suspensive appeal challenging the revocation of its license was set for trial in Louisiana Civil District Court for the Parish of Orleans when the parties entered into the Consent Judgment in November 1996.

Contrary to Livingston Downs Statement of Facts presented to the Supreme Court, the Racing Commission did not approach Livingston Downs to propose the Consent Judgment and certainly did not enter the Consent Judgment, as Livingston Downs represents, to secure a

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[28] ***Pet. Appendix K,*** *Writ denied,* Louisiana Supreme Court.

[29] ***Pet. Appendix D,*** Decision of the Louisiana Fourth Circuit Court of Appeal.

dismissal from Livingston Downs of an action brought in federal court against certain individual Commissioners.[30]

The Consent Judgment was only a part of a larger settlement agreement. The settlement provided that Livingston Downs dismiss its action in United States District Court for the Middle District of Louisiana against certain individual Commissioners. However, the settlement also provided that the Racing Commission would not pursue Livingston Downs for minimum license fees owed totaling $200,000.[31]

The Consent Judgment was intended to settle the pending petition for trial de novo appealing the revocation of Livingston Downs' license to operate a racetrack in Louisiana.

The Racing Commission had nothing to lose nor anything to gain by trying the petition on its merits. Conversely, Livingston Downs risked an adverse ruling on the merits which would have meant the loss of its license in 1997.

The Consent Judgment provided Livingston Downs two additional years within which to financially rehabilitate itself and cure any obstacles which prevented it from constructing and opening a racetrack under the license it possessed.

The terms of the Consent Judgment provide that **Livingston Downs Racing Association, Inc.** make application to the Racing Commission on or before October 31, 1998 which application shall include

> **"within the application binding, enforceable commitment letter(s), in an amount not less**

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[30] ***Petition***, p. 7.

[31] ***Appendix I***, Settlement.

than TEN MILLION ($10,000,000.00) DOLLARS,"[32]

Remedies defined under the Consent Judgment for each party were set forth in paragraphs 15 and 16 which read as follows:

> 15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event that Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, racing oval and backside, on the timetable as set forth hereinafter, then these proceedings shall be dismissed with prejudice at plaintiff's costs.
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> 16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

The Consent Judgment specifically reserved jurisdiction over the enforcement of the Consent Judgment to the trial court in Paragraph 18.[33]

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[32] ***Pet. Appendix N***, Consent Judgment.

[33] ***Pet. Appendix N***, Consent Judgment.

On November 1, 1998, the Racing Commission received an application from **Livingston Downs Racing Association, L.L.C.**, a new and different legal entity from the one specified in the license and Consent Judgment.

Attached to the application was a document entitled "Conditional Commitment for Collaterlized [sic] Mortgage" provided to Al J. Ransome. The document begins Livingston Downs Racing Association, Inc. "have submited a loan application in the aggregate amount of $10,000,000." The conditional commitment purportedly provided for financing in the "maximum principal amount of $10,000,000 Dollars" subject to and conditioned upon performance and/or satisfaction of additional terms, the performance and satisfaction of which was based on the "sole and absolute discretion of Remington Financial Group, Inc."[34]

Under Louisiana law, a suspensive condition that depends solely on the will of the obligor makes the obligation null. La.Civ.Cd. Article 1770.

An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. *Willowood Condominium Ass'n, Inc. v. HNC Realty Co.*, 531 F.2d 1249 (5th Cir. 1976). The *Willowood* court found that a 4.7 million dollar loan commitment is not a casual endeavor but an enterprise carefully entered into by each party. The court held that a letter setting forth terms upon which a loan to developers would be made subject to approval of a loan committee which failed to include essential elements of a loan was not an enforceable loan commitment. *Willowood*, 531 F.2d at 1252.

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[34] ***Appendix A***, "Conditional Commitment for Collaterlized [sic] Mortgage Financing."

The Conditional Commitment submitted by Livingston Downs was not a binding, enforceable commitment as required by the Consent Judgment but nothing more than a letter setting forth terms upon which a loan may be made. There is no funding date specified, or monthly payment set forth, or rate of interest, or commitment fee paid which is evidenced in writing. Further, it implies the need for substantial further negotiation as the writing is entirely subject to the discretion of the lender or investors, whoever they may be.

The issue whether the Conditional Commitment and application satisfied the terms of the Consent Judgment was presented to the Louisiana Civil District Court for the Parish of Orleans by a motion to dismiss as anticipated in Paragraph 15 of the Consent Judgment.

The Motion to Dismiss and Memorandum in Support were filed on November 10, 1998. The motion was set for hearing on December 4, 1998. Livingston Downs was served under La.Civ.Code Pro. art. 1314 by the sheriff on counsel of record.[35]

Livingston Downs filed a memorandum in opposition to the motion to dismiss.[36]

The motion came for contradictory hearing on December 4, 1998. Following argument of counsel for the Racing Commission and Livingston Downs, the court concluded based upon the evidence presented that the application and conditional commitment submitted by Livingston Downs did not comply with the terms of the

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[35] ***Appendix G***, Memorandum In Support of Motion to Dismiss.

[36] ***Appendix H***, Memorandum In Opposition to Motion to Dismiss.

Consent Judgment and dismissed the case pursuant to paragraph 15 of the Consent Judgment.

The Louisiana Fourth Circuit Court of Appeal affirmed the trial court finding the following:

> "We note that the conditional commitment submitted by Livingston Downs provided for financing in the 'maximum amount of $10,000,000' rather than in 'an amount not less than' ten million dollars as required by the consent judgment. Also, the conditional commitment provided for ownership in the 'project' by unknown persons 'at the sole and absolute discretion of Remington Financial Group, Inc.' "[37]

Livingston Downs has never, and still does not, challenge the factual finding first made by the trial court that the conditional commitment for collateralized mortgage financing was *not* an "enforceable, binding commitment" per the terms of the Consent Judgment.

3. Due Process Afforded Livingston Downs

On appeal to the Louisiana Fourth Circuit Court of Appeal from the trial court's ruling, Livingston Downs raised that the motion to dismiss filed by the Racing Commission pursuant to the terms of the Consent Judgment represented an unlawful adjudication of its license which did not comply with the Louisiana Administrative Procedure Act and Open Meeting Law.[38]

Livingston Downs again raises these complaints to the Supreme Court. In response, this opposition looks

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[37] ***Pet. Appendix D***, p. 10, Decision of the Louisiana Fourth Circuit Court of Appeal.

[38] ***Appendix C***, p. 14, Livingston Downs, Appellant Original Brief to Louisiana Fourth Circuit Court of Appeal.

now at the due process afforded Livingston Downs through the provisions of the Louisiana Administrative Procedure Act and Open Meeting Law.

The Louisiana Open Meeting Law provides that every meeting of any public body shall be open to the public, and all votes by members shall be *viva voce* and recorded in the minutes of the meeting.[39]

The Racing Commission is comprised of nine members appointed by the Governor and confirmed by the state senate.[40] A meeting of the Racing Commission or congregation of five or more members for the purpose of discussing official business or to take action is governed by the Louisiana Open Meeting Law.

The Racing Commission's regulatory hearing, practices and procedures for suspending, withdrawing or revoking racing licenses and promulgating rules are as provided by the Louisiana Administrative Procedure Act.[41]

In any adjudication before the Racing Commission, all parties are afforded a hearing after reasonable notice. Every party adjudicated is further afforded opportunity to respond and present evidence on all issues of fact involved.[42]

Nothing, however, provided by the Administrative Procedure Act precludes an informal disposition of any adjudication by stipulation, agreed settlement, consent order, or default.[43]

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[39] ***Appendix B***, La. Rev. Stat. Ann. § 42:4 *et seq.*

[40] ***Appendix B***, La. Rev. Stat. Ann. § 4:144.

[41] ***Appendix B***, La. Rev. Stat. Ann. § 4:154.

[42] ***Appendix B***, La. Rev. Stat. Ann. § 49:955(C).

[43] ***Appendix B***, La. Rev. Stat. Ann. § 49:955(D).

Any person aggrieved by a decision of the Racing Commission is entitled to judicial review by filing a petition in the district court of the parish in which the agency is located within thirty days after mailing notice of the decision. The filing of the petition does not itself stay the decision, but the reviewing court may order a stay *ex parte*.[44]

Thereafter, either party may obtain further review on petition for appeal from the district court to the appellate courts.[45]

The Racing Commission is domiciled in the Orleans Parish, City of New Orleans. Louisiana Civil District Court for the Parish of Orleans is the court of proper venue to review any decision of the Racing Commission.[46]

a. Due Process Afforded Livingston Downs On License Revocation

Livingston Downs' eligibility to hold its license came for hearing before the Racing Commission after notice provided in accordance with the Administrative Procedure Act. It was given ample opportunity to present evidence regarding its eligibility to retain its license. The evidence Livingston Downs presented was that it did not, after eighteen months, so much as acquire the land on which the racetrack was to be situated. And further, Mr. Ransome, Livingston Downs' promoter, explained the following:

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[44] ***Appendix B***, La. Rev. Stat. Ann. § 49:964, *see also* La. Rev. Stat. Ann. § 4:158.

[45] ***Appendix B***, La. Rev. Stat. Ann. § 49:965.

[46] ***Appendix B***, La. Rev. Stat. Ann. § 145.1.

> "We are not trying to raise the money for the racetrack first. We are going to go ahead and get land done and then fight the battle because we will be having a thing."[47]

The "thing" is that Livingston Downs contended a racetrack is not a viable financial endeavor without off-track wagering.[48] But, the license granted to Livingston Downs by the Racing Commission was not predicated upon it having off-track wagering because the law did not allow for it.[49]

Livingston Downs was given notice and opportunity for a meaningful hearing before the Racing Commission under the Administrative Procedure Act, and the Racing Commission concluded upon the evidence presented that Livingston Downs' license should be revoked.

As further proof Livingston Downs was adequately provided due process, the Racing Commission was advised by Livingston Downs' attorney that a petition for trial de novo was filed within minutes of the Racing Commission's decision to revoke its license in a court eighty miles away enjoining the revocation because:

> "As you can tell, we fully expected the vote that happened today."[50]

Livingston Downs did not allege that its license was revoked by the Racing Commission without due process.

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[47] As spoken by Livingston Downs promoter/owner, ***Pet. Appendix M***, p. 70, Apr. '94 Trans., Racing Comm'n Meeting.

[48] As spoken by Livingston Downs' attorney, ***Pet. Appendix M***, p. 15, Apr. '94 Trans., Racing Comm'n Meeting.

[49] *Jefferson Downs v. La. Racing Comm'n*, 637 So.2d 1279 (La.Ct.App. 4th Cir. 1994).

[50] As spoken by Livingston Downs' attorney, ***Pet. Appendix M***, p. 84, Apr. '94 Trans., Racing Comm'n. Meeting.

Rather, it alleged that its license was revoked without "just cause".[51] However, the "just cause" for revoking its license was supported by *the evidence Livingston Downs presented* to the Racing Commission that a racetrack in Livingston Parish was not presently financially feasible.

Subsequently, Livingston Downs challenged the constitutionality of the law which precluded it from obtaining an off-track wagering license.

The suit challenging the constitutionality was still pending when Livingston Downs and the Racing Commission agreed to enter into the Consent Judgment.

The Consent Judgment came for approval before the Racing Commission at a meeting in November 1996 convened in accordance with the Open Meeting Law. The Consent Judgment was approved on the record in open meeting.

In December 1997, the Louisiana Supreme Court ruled to uphold the constitutionality of the state statute which precluded Livingston Downs from ever obtaining an off-track wagering license. This decision is now final.[52]

Livingston Downs then argued that the Consent Judgment did not settle issues raised by the petition.[53]

What would be the purpose to the consent judgment, any consent judgment, if it were not to finally resolve the dispute? If the purpose was to do nothing more than afford Livingston Downs two additional years there

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[51] ***Pet. Appendix L***, Petition for Trial De Novo.

[52] *Livingston Downs Racing Ass'n v. Louisiana*, 705 So.2d 149 (La. 1997), *reh'g denied*.

[53] ***Appendix C***, p. 13, Livingston Downs, Appellant Original Brief to the Louisiana Fourth Circuit Court of Appeal.

would have been no need for a *Judgment* or for that matter a revocation.

The Louisiana Fourth Circuit Court of Appeal found no merit in Livingston Downs' argument and rested its decision upon the terms of the Consent Judgment. More particularly, it found that the Racing Commission complied with the Administrative Procedure Act and Open Meeting Law when it approved the Consent Judgment, but that thereafter jurisdiction over the Consent Judgment was reserved to the trial court.[54]

Livingston Downs has never contended that the Consent Judgment itself is unenforceable because the Racing Commission did not comply with the Open Meeting Law or Administrative Procedure Act in its approval. Certainly, Livingston Downs has availed itself of all benefits afforded Livingston Downs under the Consent Judgment.

b. Due Process Afforded Livingston Downs On Judicial Review

Lastly, Livingston Downs presents its due process rights were violated on judicial review at both the trial and appellate levels.

The violation, it contends, at the trial level occurred because it was denied an opportunity to be heard. This is simply untrue. The hearing was necessarily based on the implementation and enforcement of the Consent Judgment. Livingston Downs was represented at the hearing by its counsel, who argued before the district judge.

It did not, because it could not, supply evidence that its commitment was for "not less than TEN MILLION

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[54] ***Pet. Appendix D***, Decision of the Louisiana Fourth Circuit Court of Appeal.

($10,000,000) DOLLARS" instead of not to exceed Ten Million Dollars.

Livingston Downs had the benefits of a contradictory hearing. It simply could not benefit from such a hearing because of the undisputed facts.

Insofar as it alleges that its rights were violated on appeal due to an "incomplete" record, it suffices to note that Livingston Downs has never particularlized or specified just what would be established by the "missing" pleadings or transcripts. Listed at ***Pet. Appendix E*** and ***F***, there is no explanation or analysis or support of how their consideration would have changed the results.

Moreover, Livingston Downs did not consider the certified record on appeal so important that it verified its correctness before filing its brief to the court. Rather, it was counsel for the Racing Commission who brought to the court's attention that particular documents *necessary* to the appeal were not properly before the court.[55] These documents were, nevertheless, attached to both appellant's and appellee's brief.

4. Equal Protection to Livingston Downs

Lastly, Livingston Downs argues that its rights of equal protection were violated by the revocation of its license by the Racing Commission.

Before this application, Livingston Downs never raised the issue that the revocation of its license by the Racing Commission violated its right to equal protection under the law. It did not plead it in its original petition

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[55] ***Appendix F***, Louisiana Racing Commission, Respondent Original Opposition to Application on *Writ of Certiorari* to Louisiana Supreme Court.

for trial de novo and suspensive appeal.[56] It did not argue it to the Louisiana Fourth Circuit Court of Appeal following the dismssal of the action.[57] It did not argue it to the Louisiana Supreme Court on application of *writ of certiorari* to review the Louisiana Fourth Cirucit Court of appeal, which application was denied.[58] Therefore, it is not properly before this court for consideration.

Now for the first time, Livingston Downs argues that the revocation of its license under La. Rev. Stat. Ann. § 4:160 violated its right of equal protection because the Racing Commission did not promulgate rules to guide application of La. Rev. Stat. Ann. § 4:160.

Assuming *arguendo* equal protection was ever at issue, the issue was laid to rest when Livingston Downs entered the Consent Agreement. The Consent Judgment established the standard and stipulated that the financial suitability necessary for Livingston Downs to maintain its eligibility to hold the license necessitated a commitment of not less than Ten Million Dollars. Livingston Downs accepted that standard and the Racing Commission agreed to the standard when each party entered the Consent Judgment. If Livingston Downs did not secure the requisite financing it was "just cause" under the Consent Judgment to have the litigation challenging the revocation of the license dismissed.

Further, the Racing Commission is not required to promulgate rules for the application of every state statute but rather for the conduct of racing not provided by statute. The Racing Commission has established extensive

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[56] ***Pet. Appendix L.***

[57] ***Appendix C.***

[58] ***Appendix E.***

Rules of Racing governing the conduct of racing and maintenance of racetracks which are reported in the Louisiana Administrative Code. The standard for revoking an association license to operate a racetrack is sufficiently perscribed by La. Rev. Stat. § 4:160.

If Livingston Downs seriously believed that its license could be maintained irrespective of the financial ability to bring racetrack into existence and believed that any other association did so in the past, it would have raised the issue properly before now.

CONCLUSION

This case comes on a petition for a *writ of certiorari* from a state court decision finding that Livingston Downs failed to satisfy the terms and conditions of a Consent Judgment which it entered into in November 1996.

The cause before the Court does not present any important federal issue which merits the Court's attention, but by petitioner's own statement, turns solely upon the application of state law.

Livingston Downs has had all the benefits of due process and equal protection under the law to which it is entitled, and then some. It has been given every opportunity by the Racing Commission affordable.

If Livingston Downs had the financial wherewithal to construct and open a racetrack in Livingston Parish, there would be a racetrack in Livingston Parish. According to Livingston Downs, a racetrack is not a viable financial endeavor in the current climate.

The Racing Commission's regulatory actions, nor those decisions by Louisiana courts on review, are the cause or source for Livingston Downs' grievance.

For these reasons, the Louisiana State Racing Commission respectfully opposes petitioner, Livingston Downs, application for *writ of certiorari*.

Respectfully submitted,

KIM RAINES CHATELAIN (#21525)
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New Orleans, Louisiana 70119
(504) 483-4000
Counsel of Record for the Racing Commission

APPENDIX A

(LOGO) *REMINGTON FINANCIAL GROUP, INC.*

Two Bala Plaza • Suite 300
Bala Cynwyd, PA 19004
(610) 660-7793
TEL (215) 887-9822 *FAX (215) 887-9628*

October 28, 1998

Applicant: Mr. Al J Ransome
Livingston Downs Racing Association, Inc.
5353 Florida Blvd
Baton Rouge, LA 70821

RE: Initial financing of the LDRA race track and multi profit center complex

CONDITIONAL COMMITMENT FOR COLLATERLIZED [sic] MORTGAGE FINANCING

Livingston Downs Racing Association, Inc. (herein referred to as "Borrower") have submitted a loan application for financing in the aggregate principal amount of $10,000,000 to be collaterlized [sic] by the land and all building and improvements thereon, said 264.6 acre tract more fully described in on [sic] Schedule "A" (herein referred to as "Collateral") attached hereto and made a part hereof.

In support of this loan request, the Borrower has submitted, or will submit, certain financial data and supporting documentation listed and described on schedule "B" attached hereto and made a part hereof.

Subject to and conditioned upon performance and/or satisfaction of the terms, provisions, and conditions of

this Loan Commitment, which performance and/or satisfaction will be based on the sole and absolute discretion of Remington Financial Group, Inc., a Pennsylvania corporation, or our affiliates, participants and assigns (herein collectively referred to as "Lender"), and conditioned and in reliance upon certain representations and warranties made by the Borrower and its authorized representatives, Borrower shall receive financing in the maximum principal amount of $10,000,000

The terms, provisions and conditions of this Loan Commitment are as follows:

1. The loan amount ("Loan") will be in the principal amount of $10,000,000. Said loan amount shall not exceed 80% of subject property's Fair Market Value.

2. There shall be aggregate Loan placement, processing and origination fees on the entire amount of the Loan, payable to the Lender, in the amount equal to 2% of the gross Loan amount. This amount is payable in the same proportions as the Loan is funded.

3. If Borrower has agreed to pay brokerage fees in accordance with a separate agreement, Borrower may pay such fees from Loan proceeds.

4. The interest rate on mortgage Loan shall be the prime rate (currently 8.0%) plus 2% points, per annum. Interest may accrue. Interest rate is adjustable on a quarterly basis.

5. This mortgage and [sic] shall be due and payable in full 60 months following the date of closing of the Loan. Lender shall provide option to extend for 1 additional year at its sole discretion. There shall be no prepayment penalty.

6. The Loan shall be funded on or before [To be determined]. Funding is conditioned upon Lender receiving from Borrower all information and data specified herein and on the attached Schedules and also upon Borrower making all deposits and paying all fees specified herein and being in compliance with all other terms and conditions herein. Further, closing shall commence as quickly as (30) days after all general conditions and the specified conditions contained herein are met.

7. A description of the Collateral securing the Loan is set forth on Schedule "A" attached hereto. Lender, at its sole option, may subordinate to senior financing as it may become available to or benefit the Project. In this case, Lender shall maintain clear Second Mortgage. Borrower shall also pledge 100% of available stock of Borrowing entity until all principal and interest is repaid.

8. 15% of net cash flow, profit participation and ownership of the project shall go to RFG, which interest shall begin upon principal and interest repayment, provided said participation generates a 25% minimum annual I.R.R.

9. Prior to closing, the Borrower, shall be required to meet the following conditions:

a. Borrower must provide proof of the receipt of a 10 year license to conduct race meetings issued to LDRA by the Louisiana State Racing Commission. The license must be issued to a LLC.

b. Borrower must provide, if required, environmental and wetlands clearances.

c. Borrower must provide proof that the result of the January 16, 1993 election are final and that no further challenges or action will be bought [sic].

10. Borrower agrees to endorse or furnish all other documents, contracts, collateral, agreements, affidavits or materials which may be requested by RFG prior to, contemporaneous with, or subsequent to settlement of this Loan which may be deemed as necessary by RFG to protect its interest in the Loan and/or collateral.

11. Borrower is advised that RFG shall assign the contemplated financing herein to its investor that may have one or more participants, owning rights in the loan, or co-lenders, either at loan closing or at any time thereafter.

12. This Loan Commitment shall not be valid unless accompanied by a Loan Commitment fee in the amount of $N/A payable in accordance with the provisions contained herein.

13. The loan will be evidenced by a collaterlized [sic] promissory note (the "Note"), executed and endorsed by Borrower, as well as by any other person or entity with a title or beneficial interest in any of the Collateral securing this Loan, to the extent of such interest.

14. At and in all events, this Loan Commitment is subject to Lender's approval, in its sole and absolute discretion, of a current appraisal (or, at Lender's option, a confirming appraisal) of the Collateral.

15. At the date of settlement of this Loan, Borrower shall furnish Lender with paid receipt for fire insurance and extended liability insurance policy(s) covering the Collateral. Insurance coverage shall be in such amounts as are acceptable to Lender. Such insurance

policy's shall designate Lender as "Loss Payee" as its interest shall appear.

16. Real estate taxes, water and utility assessments, and any other assessments relating to the Collateral, must all be current or brought to a current status as of the date of settlement of this Loan. All such ownership costs must be kept in a current status throughout the term of this Loan. Such obligations shall remain current at all times or this Loan may be declared in default by Lender.

17. Prior to settlement of this Loan, Borrower shall furnish Lender with title insurance policy(s) on the Collateral acceptable to Lender, in its sole discretion. Such policy(s) shall name Lender as an insured mortgagee relative to the property(s) as its interest shall appear. Borrower shall also furnish to Lender with paid receipt(s) for fire insurance and extended liability insurance policy(s) covering the Collateral.

18. Borrower shall be responsible for, and shall pay all title company charges, reasonable attorney's fees, recording fees, document preparation charges and other third party fees required and incurred by Borrower and Lender in connection with the processing and settlement of this Loan.

19. Lender shall receive all assurances which Lender, in its sole discretion, determines are necessary and appropriate [sic] the Collateral meets or exceeds all Federal, State, County and or City environmental standards.

20. Prior to settlement of this Loan, Borrower will furnish Lender with authentic copies of any and all licenses, permits, bonds, approval, and authorizations as may be required in connection with the Project, its ownership and operation as determined by Lender in their sole opinion.

21. Borrower agrees to endorse or furnish any other documents, contracts, collateral, agreements, affidavits or materials which may be requested by Lender prior to, contemporaneous with, or subsequent to settlement of the Loan, which may be deemed necessary in its sole discretion to protect Lender's interest in the Loan and/or the Collateral.

22. Borrower will sign an affidavit at closing of this Loan stating the proceeds of this Loan will be used exclusively for the purposes stated on Schedule "C" to become part of Loan commitment.

23. This Loan commitment is contingent on Borrower having the capability, in the sole discretion of Lender, of servicing and repaying of Loan in accordance with its terms.

24. Lender, at its option may obtain credit information and accompanying data in the form of a credit report relative to borrower, and Borrower gives consent as to this provision.

25. There shall be a late fee charged during the period of the mortgage term in the amount of 5% of the monthly instalment [sic] amount on payments not received within 10 days of its due-date.

26. At and in all events, this Loan commitment is subject to Lender's approval in its sole discretion of all necessary documentation relating to Borrower, Project and Collateral.

27. This Loan Commitment shall not be valid unless accompanied by a Loan Commitment fee in the amount of $ N/A. This signed Loan commitment must be accompanied by payment of the aforementioned fee made payable to Remington Financial Group, Inc. This sum will be credited to against the Loan placement, processing, and origination fee

referred to in Paragraph 2, above. Said non-refundable fee represents payment for expenses incurred and efforts rendered by Lender with respect to investigations, inspections, verifications, confirmations, analyses and other services relative to Borrower, Project, and Collateral offered in support of this Loan.

28. This Loan commitment is conditioned upon acceptance of and compliance with the terms and conditions of this Loan commitment. Compliance shall be determined in the sole and absolute discretion of Lender. Borrower is advised that RFG shall assign the contemplated financing herein to its investor that may have one or more participants, owning rights in the loan, or co-lenders, either at loan closing or at anytime thereafter.

29. This Loan Commitment is contingent upon its compliance as presently structured with all applicable Pennsylvania rules, regulations and statutes relative to commercial/investment financing transactions.

30. This Loan Commitment is not valid unless a copy of such Commitment is dated, signed by Borrower and Lender, and returned on or before November 10, 1998.

ACCEPTED BY BORROWER:

Livingston Downs Racing Association, LLC

By: /s/ Al J. Ransome 10/30/98
[date of acceptance]

ACCEPTED BY:

Remington Financial Group, Inc.

By: /s/ M. McManus 10/30/98
Matthew E. McManus [date of acceptance]

APPENDIX B

Appendix B reproduces, only in pertinent part, certain Louisiana statutes which are relevant to the petition for writ application before the court.

Included are pertinent parts of the following Louisiana Revised Statutes:

(1) Title 4, Chapter 4 related to Horse Racing;

(2) Title 36, Organization of the Executive Branch;

(3) Title 42, Public Officers and Employees, the "Open Meeting Law;"

(3) Title 49, State Administration, the "Louisiana Administrative Procedure Act."

LOUISIANA REVISED STATUTES
TITLE 4. AMUSEMENTS AND SPORTS
CHAPTER 4. RACING
PART I. HORSE RACING

§ 141. Legislative intent and policy

A. It is the policy of the state of Louisiana in furtherance of its responsibility to provide revenues for the operation of state government for its people, to acknowledge and declare that the providing of funds and financial assistance to licensed horse racing tracks in the state of Louisiana constitutes an authorized public function and purpose of the state of Louisiana, to encourage forceful and honest statewide control of horse racing for the public health, safety, and welfare by safeguarding the people of this state against corrupt, incompetent, dishonest and unprincipled horse racing practices;

(1) To institute and maintain a program to encourage and permit development of the business of horse racing with pari-mutuel wagering thereon on a high plane.

(2) To institute and maintain a program to encourage and permit development of the breeding and ownership of race horses in the state.

(3) To institute and maintain a regulatory program for the business of racing horses, which program assures the protection of public health, safety and welfare, vesting with the commission forceful statewide control of horse racing with full powers to prescribe rules and regulations and conditions under which all horse racing is conducted with wagering upon the result thereof with the state.

(4) To institute and maintain a program to provide financial assistance that will encourage and permit the development of the business of horse racing by licensed horse racing tracks in the state of Louisiana.

(5) To institute and provide a program for the regulation, ownership, possession, licensing, keeping, and inoculation of animals on premises under its control and supervision not inconsistent with the rules and regulations of the state livestock and sanitary board.

B. This Chapter is an exercise of the police powers of the state to promote the public health, safety and welfare.

§ 144. State Racing Commission; creation; membership; tenure; powers and duties; quorum; qualification of members; per diem; expenses and disbursements; bond

A. There is hereby created in the executive branch of state government a racing commission, to be known as the "Louisiana State Racing Commission". The commission shall have the powers and duties specified in this Part and all other powers necessary and proper to enable it to execute fully and effectually all of the objects, purposes, duties, and policies of this Part. It shall be composed of ten persons appointed by the governor, one appointed from each congressional district and two appointed at large. Each appointment by the governor shall be submitted to the Senate for confirmation. The governor shall select one member of the commission to serve as chairman. The commission shall select from among its membership a vice chairman and a second vice chairman for two year terms. Each member shall serve at the pleasure of the governor. A majority of the members shall constitute a quorum for the transaction of any business or the exercise of any power.

§ 145.1. Exclusive venue for law suits against the commission

The commission may be sued only in the city of New Orleans, parish of Orleans.

§ 148. Rules, regulations and conditions

The commission shall make rules, regulations and conditions for the holding, conducting and operating of all race tracks, race meets and races held in this state and

for the conduct of the racing industry of this state under this Part. Special rules, regulations and conditions may be promulgated separately for thoroughbred racing and for quarter horse racing. Said rules, regulations and conditions shall be consistent with this Part and provide for and deal with all matters necessary to the holding of such race meetings.

§ 149. Wagering; rules and regulations

The commission may prescribe rules and regulations under which shall be conducted all horse races upon the results of which there is wagering. The commission shall, as may be necessary, prescribe additional special rules and regulations applicable separately to thoroughbreds and quarter horses. The commission shall make rules governing, permitting, and regulating the wagering on horse races under the form of mutuel wagering by patrons, known as pari-mutuel wagering. Only those persons receiving a license from the commission may conduct this type of wagering, and shall restrict this form of wagering to a space within the race meeting grounds. All other forms of wagering on the result of horse races are illegal, and all wagering on horse races outside the enclosure where horse races have been licensed by the commission is illegal.

§ 149.2. Other track wagering

A. The commission may make rules regulating pari-mutuel wagering known as other track wagering.

B. (1) With the consent of the commission, an association may accept wagers at its facility for the entire racing card scheduled on horse racing events of regional, national, and international interest conducted at another track outside of this state, and transmitted either by simulcast or other means of video transmission, pursuant to a contract with the association or other entity conducting the event.

(2) After payment of license fees and commissions to the secretary as required by this Part and payment of the contract amount to the association or other entity transmitting the event, the remaining proceeds shall be retained by the licensee, fifty percent of which shall be distributed by such track licensee as purses.

C. (1) With the consent of the commission, an association conducting horse racing events at a track in this state may, by contract, authorize an association elsewhere in this state at their racing facilities, or any entity outside of this state, at its facilities, including legal nonracing facilities outside of this state, to accept wagers on such events.

(2) After payment of license fees and commissions to the secretary, if required by this Part, the amount of fees collected from any entity outside of this state at its facilities, including legal nonracing facilities outside of this state, shall be retained by the licensee, fifty percent of which shall be distributed by such track licensee as purses.

D. All contracts pursuant to this Section shall comply with all applicable laws of the United States, including 15 U.S.C. §§ 3001, et seq., and shall be entered into

only with entities operating racetracks permitted by applicable law to conduct horse racing and wagering thereon.

§ 149.3. Interstate wagering; common pools

A. Subject to applicable federal laws, including but not limited to the Interstate Horseracing Act of 1978 (Chapter 57, commencing with Section 3001, of Title 15 of the United States Code) the commission may permit a licensee to participate in interstate common pools, including common pools which may include international jurisdictions. All provisions of law governing pari-mutuel betting apply to pari-mutuel betting in interstate common pools except as otherwise provided in this Section or in the commission's rules.

B. Participation in a common pool solely as a track conducting the race or as a receiving track will not cause such track to be deemed to be doing business in this state, or in the other state, for any purpose.

C. With the prior approval of the commission, a licensee who is permitted to accept wagers in this state on horse races conducted at tracks conducting races located outside of this state may combine pari-mutuel pools in this state with comparable pools at the track conducting the race.

D. Notwithstanding other provisions of this Chapter and subject to the approval of the commission, the types of wagering, takeout, distribution of winnings, and rules of racing in effect for pari-mutuel pools at the track conducting the race shall govern wagers placed in this

state and merged into the interstate common pool. Breakage for interstate common pools shall be calculated in accordance with the law or rules governing the track conducting the race, and shall be distributed between participating jurisdictions in a manner agreed to between the licensee and the track conducting the race.

E. With the prior approval of the commission and with the concurrence of the track conducting the race, an interstate common pool may be formed among the licensee and other receiving persons or entities in any states other than the state in which the track conducting the race is located. For such an interstate common pool, the commission may approve the types of wagering, takeout, distribution of winnings, rules of racing, and calculation of breakage which are different than those which would otherwise be applied in this state but are consistent for all parties to the interstate common pool.

F. The licensee may deduct from wagers placed in any interstate common pool any fee to the person or entity conducting the race for the privilege of conducting pari-mutuel wagering on the race, and payment of costs incurred in transmitting the broadcast of the race and participation in the interstate common pool.

G. The provisions of law or contract, if any, governing the distribution of shares of the takeout, from wagers placed in this state in separate pari-mutuel pools on races run in another state, to this state as pari-mutuel taxes, or respectively to breeder awards and to purses in this state, shall remain in effect for wagers placed in interstate common pools; provided that if the commission has

approved an adjustment in the takeout rate, the distribution of the takeout within this state shall be adjusted proportionately to reflect the adjustment in the takeout rate; provided further that with the concurrence of the licensee, the share designated for purses may be modified.

H. With the prior approval of the commission, a licensee may permit one or more of its races to be utilized for pari-mutuel wagering at one or more locations in other states, may transmit audio/visual signals of races the licensee conducts to one or more locations outside the state, and may also permit pari-mutuel pools in other states to be combined with its comparable wagering pools or with wagering pools established by other states. The commission may modify its rules and may adopt separate rules governing interstate common pools, and may establish by rule separate provisions for interstate common pools governing the calculation of breakage.

I. Pari-mutuel taxes shall not be imposed upon any amounts wagered in an interstate common pool other than upon amounts wagered within this state.

J. The provisions of law or contract, if any, governing the distribution of shares of the takeout, from wagers placed in other states in separate pari-mutuel pools on races run in this state, respectively to breeder awards and to purses in this state, shall remain in effect for wagers placed in interstate common pools. Provided that with the concurrence of the licensee and the Horsemen's Benevolent and Protective Association, and the appropriate breeder's organization, the share of breeder awards or purses may be modified.

§ 154. Administrative procedure; appeal to the commission and review of commission rulings

A. Except as otherwise provided by this Section, the commission's hearings, practice and procedure, and rule making procedure are as provided in the Administrative Procedure Act; however, in cases made the subject of judicial review, the court may not extend or continue beyond ten (10) days from date of issuance any stay order or temporary restraining order issued by it, except:

(1) Upon agreement of counsel for all parties, or

(2) Absent such agreement, by order of the court, but only after a contradictory hearing held no later than the tenth (10th) day following the issuance of such stay order or temporary restraining order and then only upon a showing by a party that a denial of such extension or continuation would be prejudicial to that party's opportunity to cause the court to affirm, modify, or reverse the decision appealed from or to be reviewed.

B. A final appeal, in the case of any person penalized, or disciplined by the stewards, may be taken to the commission.

C. Such an appeal must be filed in writing at the office of the commission within five days of the date of said penalty or imposition of said discipline.

D. Such an appeal must be signed by the person making it and must set forth his reason therefor.

E. An appeal from the decision of the stewards to the commission shall not affect such decision until the appeal has been acted upon by the commission.

F. The commission must grant a hearing within ten days of the receipt of this appeal, and must render a decision within forty-eight hours following the conclusion of the appeal hearing. Any continuance of a hearing must be reasonable in duration and for just cause.

§ 158. License or permit to conduct race meetings, one-year and ten-year licenses

A. On or before the fifteenth of April of each year and on or before the fifteenth of August of each year any person possessing the qualifications prescribed in this Part may apply to the commission for a license to conduct race meetings. On or before the first of May and the first of September of each year, after receipt of the applications the commission shall convene to consider the refusal or granting of the permits or licenses applied for. An application filed prior to any one of the two deadlines shall request dates for racing to commence not sooner than four months from said deadlines. The permits or licenses granted shall set forth the name of the licensee, the location of the race track, the duration of the race meeting, and the kind of racing desired to be conducted, and shall recite the receipt by the commission of the license fee provided for in this Part. The license is not transferable nor does it apply to any place, track, or enclosure except the one specified in the license. Should the commission, after due proceedings had in conformity with this Part, suspend or revoke an association's license or terminate the racing privileges granted to an association, said association may within ten days of the notification of the commission's decision take a suspensive appeal to the district court having jurisdiction over the

association's track. Such appeals shall be filed in the district court in the same manner as original suits are instituted therein. The appeals should be tried de novo. Either party may amend and supplement his pleadings and additional witnesses may be called and heard.

Within ten calendar days of the signing of the judgment by the district court in any such appeal case, the commission or the applicant for a license or licensee, as the case may be, may suspensively appeal the judgment to the appellate court of proper jurisdiction. These appeals shall be perfected in the manner provided for in civil cases and shall be suspensive or devolutive in the discretion of the court.

All proceedings in the district and appellate courts arising under this Part are civil in nature and shall be heard summarily by the court, without a jury, shall take precedence over other civil cases, and shall be tried in chambers or in open court, and in or out of term.

B. The provisions of this Part to the contrary, notwithstanding, the commission may contract with any licensee for a permit to operate a track for a period of ten years. Such permit shall conform to all the requirements as set out in Subsection (A) of this section; however, any licensee applying for a ten-year license under this section shall also agree in writing to expend the sum of no less than $10,000.00 per year or $100,000.00 during said ten-year period for the purpose of repairs and improvements to the track and its facilities, said sum to be expended during said ten-year period.

The commission may approve an application for racing dates for a period not exceeding three racing years,

when a contract has been entered into in accordance with this section.

§ 159. Criteria for licensing associations

In the exercise of its authority in considering the granting or denying of an association's application for a license or permit to conduct racing the following criteria, standards and guides by way of illustrations without limitation should be considered by the commission.

(1) The public interest.

(2) The location of the track.

(3) The number of tracks running or making application.

(4) The adequacy of facilities of the track.

(5) The racing experience of the applicant.

(6) The moral and financial qualification of the applicant.

(7) The moral and financial qualifications of applicant's partners, officers and officials.

(8) The official attitude of local government involved.

(9) The nature of the local community affected.

(10) The expected effect upon the breeding and horse industry of this state.

(11) The expected effect upon the State's economy.

(12) The apparent or nonapparent hope of financial success.

(13) The official attitude of horsemen.

§ 160. Grounds for denial or termination of racing privileges to an association

The commission may refuse, suspend, or withdraw licenses, permits and privileges granted by it or terminate racing privileges, for just cause. Those things constituting just cause are:

(1) Any actions by a licensee or permittee contrary to the provisions of this Part and the Rules of Racing.

(2) Corrupt practice.

(3) Violations of the Rules of Racing.

(4) Intentional falsification and/or intentional misstatement of a material fact in an application for racing privileges.

(5) Material false statement to a racing official (other than a Commissioner) and/or the commission.

(6) Continued failure or inability to meet its financial obligations connected with fulfillment of the purposes for which its license was issued.

§ 181. Parish-wide election on horse racing meet

A. Notwithstanding any provision of law to the contrary, no horse racing meet in a parish in which no racing meet is being conducted on the effective date of this section, or in which no racing meet under a license

from the Louisiana State Racing Commission has been conducted prior to such effective date, shall be allowed where pari-mutuel betting is authorized by law unless the operation and conduct of the racing meet first has been approved at an election held in accordance with the provisions of this section; however, said election shall not be required prior to conducting quarter horse racing in St. Landry, Iberville, West Baton Rouge, Pointe Coupee and St. Martin Parishes.

B. Any person desiring to operate and conduct a horse racing meet in a parish in which no racing meet is being conducted on the effective date of this section, or in which no racing meet under a license issued by the State Racing Commission has been conducted prior to such effective date, shall make application to the governing authority of the parish in which the proposed horse racing meet is to be conducted. The application shall state the location of the proposed horse racing meet and describe the facilities proposed to be constructed for the holding of the racing meet and shall have attached the license, or a certified copy thereof, for the meeting issued to the applicant by the State Racing Commission.

C. Upon receipt of the application the governing authority of the parish in which the racing meet is proposed to be held shall call and conduct a referendum election within the parish for the purpose of submitting to the qualified electors of the parish the proposition whether or not the proposed racing meeting shall be allowed.

D. The referendum election shall be held on a date fixed by the parish governing authority within a period

of thirty days of receipt of the application. Notice of the election shall be published at least twice at five day intervals in the official journal of the parish or if the official journal is not published daily, then publication shall be in a daily newspaper of general circulation in the parish. The publication shall be completed at least five days prior to the date on which the election is to be held. The parish governing authority also shall have five spot announcements at least two days apart of the election broadcast on radio or television channels readily receivable in the parish and shall make notice of the election available to the news media. All qualified electors of the parish shall be entitled to vote in the election.

E. The proposition to be printed on the election ballot shall be: "Shall the business of horse racing be conducted within the parish of ___" and the voters shall vote for or against the proposition, a vote for the proposition being a "Yes" vote and a vote against the proposition being a "No" vote. The election shall be by secret ballot and conducted as nearly as possible in accordance with the general election laws of the state. Voting machines may be used and if used, the proposition to be submitted shall be shown on the machine ballot. Any elector who was qualified to vote in the election may demand a recount of the ballots or contest the election in the manner and within the time provided by law for recount or contest of elections under the general election laws of the state. The parish board of election supervisors shall supervise the election. It shall appoint three commissioners and one clerk, who shall be qualified electors and residents of the precinct, to preside over the election at each polling precinct. To reduce expenses of holding the

election, the governing authority of the parish may combine regular voting precincts provided notice of any such combination is included in the notice of the election. The governing authority of the parish shall promulgate the results of the election. For the proposition to carry, it must receive a majority vote in favor thereof of the votes cast in the election.

F. The parish governing authority shall notify the applicant and the State Racing Commission promptly of the results of the election. If the racing meet has been approved, the applicant may proceed with the racing meet in accordance with the license and rules and regulations of the State Racing Commission. If the proposed racing meet has not been approved at the election, the commission shall revoke the license theretofore issued to the applicant and shall not accept or consider an application for a license for a racing meet in the same parish until the expiration of at least two years from the date of the election at which the racing meet in the parish was disapproved.

G. Any person who conducts or attempts to conduct a racing meet in a parish in which approval of the racing meet at an election is required by this section without such election approval shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the parish jail for not more than six months and, in addition, shall be fined not more than one thousand dollars.

In addition to the penalty provided in this subsection, the district court of the parish of location of the proposed racing meet, upon application of the governing authority of the parish and upon a showing that this

section is applicable and that a racing meet is being conducted or is attempted to be conducted in violation of this section is empowered to and shall grant injunctive relief.

§ 211. Definitions

Unless the context indicates otherwise, the following terms shall have the meaning ascribed to them below:

(1) "Eligible applicants" means the primary licensee fulfilling the licensure criteria described in this Part.

(2) "Exotic wagers" or "exotic wagering pools" include all pari-mutuel pools except the win, place, or show pools conducted at each race meeting in the state. Examples of exotic wagering pools in common usage are daily double pools, exacta pools, trifecta pools, twin trifecta pools, pick-six pools, and quinella pools.

(3) "Host track" means the Louisiana track at which the race is run.

(4) "Offtrack wagering facility" means the licensed and authorized location where offtrack wagers may be accepted.

(5) "Pari-mutuel facility" means any pari-mutuel race track conducting race meetings during the 1986-87 racing season and licensed prior to the effective date of this Part.

(6) "Parish seat" means the facility, courthouse, meeting hall, etc., at which the parish governing authority meets on a regular basis in an official capacity.

(7) "Primary licensee" means the licensed association conducting the majority of race days at a pari-mutuel facility.

§ 212. Offtrack wagering; authorization

The Louisiana State Racing Commission, hereinafter referred to as the commission, is hereby authorized to license offtrack wagering in this state and shall promulgate such rules and regulations as are necessary for the efficient administration of offtrack wagering in this state.

§ 213. Offtrack wagering facilities; establishment

In addition to the rights granted in R.S. 4:149.2, any association licensed by the commission may accept and transmit wagers as provided in this Chapter and engage in all necessary activities to establish appropriate offtrack wagering facilities to accomplish this purpose. Such activities shall include, but not be limited to:

(1) Live simulcast of races from the host track.

(2) Construction or leasing of offtrack wagering facilities.

(3) Sale of goods and beverages.

(4) Advertising and promotion.

(5) All other related activities.

§ 214. Off-track wagering facilities; licensing; criteria; management; appeal of license suspension or revocation

A. License approval shall be subject to the criteria established by R.S. 4:159. Licensure shall be subject to the following conditions:

(1) Only the primary licensee operating at a pari-mutuel facility may apply for a license to operate offtrack wagering facilities in this state and only such primary licensees shall be licensed to operate offtrack wagering facilities under this Part.

(2)(a)(i) Before a license is granted for an offtrack wagering facility in any parish, the voters of that parish must have approved the establishment of such a facility within the parish in a referendum election held for that purpose. The commission shall request a referendum by the governing body of a parish only after receipt of an application for licensure of an offtrack wagering facility in that parish by the eligible applicant as provided in R.S. 4:215.

(ii) If the referendum fails to gain voter approval, or if the commission's request to the parish governing authority for a referendum is not granted within six months of such request, then the request therefor is rendered void.

(iii) Any request for an offtrack referendum that is pending on the effective date of this Subparagraph before the governing authority of a parish wherein such a referendum has failed to gain voter approval in a prior election shall be rendered void upon that date.

(iv) Any request for an offtrack referendum that has been pending before a parish governing authority for six months or more upon the effective date of this Subparagraph shall be rendered void upon that date.

(b)(i) After a request by the commission to a parish governing authority for an offtrack referendum is voided for any reason, the original applicant may either:

(aa) Resubmit the application for licensure, and the commission shall submit a new request for an offtrack referendum election to the parish governing authority; or

(bb) Submit a new application to the commission for licensure of an offtrack wagering facility in any city, town, or municipality within the parish, and the commission shall request the governing authority of such city, town, or municipality to hold an offtrack referendum election.

(ii) If the referendum fails to gain voter approval or if the commission's request for a referendum is not granted within six months of such request, the request therefor is rendered void.

(iii) If the offtrack referendum gains voter approval, the commission may license one offtrack wagering facility within the corporation limits of the city, town, or municipality in which the referendum was held. Such license must conform to all applicable licensing criteria as provided in this Part.

(c)(i) Except as provided in R.S. 4:214(A)(2)(c)(ii), the collection and distribution of license fees as provided in R.S. 4:218 shall not be affected by this Paragraph.

(ii) Notwithstanding any provision of R.S. 4:218 to the contrary, if an off-track wagering facility is located within the corporate limits of a municipality as a result of a municipal off-track wagering referendum as provided in this Paragraph, called by the municipal governing authority without the assistance of the parish governing authority, the municipal governing authority may impose a license fee not to exceed two percent of the total amount wagered at that facility, and no license fee shall be imposed by the parish, and the municipality shall retain the total license fees collected; otherwise, distribution of the fees shall be in accordance with R.S. 4:218(B).

(3) A license shall not be granted to an offtrack wagering facility to be located within a fifty-five mile radius of a pari-mutuel facility without the prior written permission of the primary licensee of that facility.

(4) Not more than two offtrack wagering facilities may be licensed in a parish with a population of less than four hundred twenty-five thousand.

(5) Final license approval is subject to local governing authority facility citing requirements.

(6) Each offtrack wagering facility shall be specifically designed as an entertainment complex. Maximum allowable attendance at each facility shall be one hundred twenty-five percent of the seating capacity at that facility.

(7) Each offtrack wagering facility shall be specifically designed as an entertainment complex. Maximum allowable attendance at each such facility shall be one hundred twenty-five percent of the seating capacity at that facility. At least one area for patrons at each offtrack

wagering facility shall be designated as a nonsmoking area.

B. (1) Licenses granted by the commission shall be valid for a ten-year period. In the event of the sale of the pari-mutuel facility, such license may be transferred and remain valid for the balance of the term of the license. If the conditions of the sale do not include the transfer of the offtrack wagering facility license, such license shall be automatically voided upon the completion of the sale.

(2) In the event a primary licensee is granted approval by the Louisiana State Racing Commission to transfer its live racing dates to another pari-mutuel facility, such primary licensee shall retain all the rights, privileges, and obligations relative to offtrack wagering facilities as provided in this Part as though it remained a primary licensee, as defined in R.S. 4:211(7), in its original location.

C. License applications shall be accompanied by a good faith deposit of one thousand dollars.

D. All primary licensees are eligible for licensure at their existing horse racing facilities as offtrack wagering facilities. Such primary licensees shall not be subject to the licensing requirements in R.S. 4:214(A)(2).

E. There shall be no penalty for closing a licensed offtrack wagering facility provided the licensee submits written notice to the commission at least thirty days prior to closure. The commission shall notify all eligible applicants of the notice of closure. Ownership of an offtrack wagering facility may be transferred to other eligible

applicants subject to all licensing requirements except as provided in R.S. 4:214(A)(2).

F. Nothing in this Part shall be construed as preventing licensees from jointly owning or contracting for the management of any or all licensed offtrack wagering facilities.

G. In no case may offtrack wagering facilities accept wagers on races run at any track without a contract with the licensee operating the host track. This contract shall include all terms and conditions for use of races run at the host track by the offtrack wagering facility, including compensation of the host track for such use. This contract shall be filed with the commission. No host track may deny the use of its races by any other offtrack wagering facility in Louisiana under the same terms and conditions.

H. In no case shall an offtrack wagering facility allow the admission of any person less than eighteen years old. However, the provisions of this Paragraph shall not apply to any offtrack wagering facility located on the premises of a pari-mutuel facility as defined in R.S. 4:211(5).

I. In addition to license fees, each licensee shall pay the fees provided for in this Subsection. Each licensee shall begin paying the fees on the first day of the second year in which the licensee operates the facility. The licensee shall pay to the collector twenty-five cents for each person attending the offtrack wagering facility other than licensed personnel, employees, officials, and working press. These payments shall be made at the conclusion of each calendar week and shall be accompanied by

a report under oath showing the total contributions and admissions, and any other information which the commission may require.

J. (1) Should the commission suspend or revoke the license of a primary licensee, the licensee may, within ten days of the notification of the commission's decision take a suspensive appeal to the district court having jurisdiction over the licensee's offtrack wagering facility. The appeal shall be filed in the district court in the same manner as an original suit is instituted thereon. Each appeal shall be tried de novo. Either party may amend and supplement his pleadings and additional witnesses may be called and heard.

(2) Within ten calendar days of the signing of the judgment by the district court in any such appeal case, the commission or the applicant for a license or licensee, as the case may be, may suspensively appeal the judgment to the appellate court of proper jurisdiction. The appeal shall be perfected in the manner provided for in civil cases and shall be suspensive or devolutive in the discretion of the court.

(3) All proceedings in the district and appellate courts arising under this Part are civil in nature and shall be heard summarily by the court, without a jury, shall take precedence over other civil cases, and shall be tried in chambers or in open court, and in or out of term.

§ 214.1. Minimum live racing dates; offtrack and other authorized wagering

An association shall not be licensed to conduct offtrack or other authorized wagering in the state unless it

conducts live horse racing for not less than eighty racing days within a twenty week period at the facility designated in its license, unless the association is prevented from live racing as a result of a natural disaster, an act of God, force majeure, a catastrophe, or such other occurrence over which the association has no control. When a pari-mutuel wagering facility and a related offtrack betting facility are sold, the purchaser shall conduct the minimum number of live racing days required by this Section as a condition of operating the offtrack betting facility.

§ 215. Offtrack wagering facilities, ownership

A. Only a primary licensee of a pari-mutuel facility may own and operate an offtrack wagering facility in a parish whose parish seat is located less than fifty-five miles from such facility.

B. Offtrack wagering facilities to be located in parishes whose parish seat is less than fifty-five miles from more than one pari-mutuel facility must be jointly owned by those facilities. Such jointly owned facilities shall be subject to the following provisions:

(1) Percentage of ownership shall be inversely proportional to the distance from the pari-mutuel facility to the parish seat of the parish in which the proposed facility is to be located.

(2) A copy of a written agreement between all eligible applicants for licensure of offtrack wagering facilities in a parish must be submitted to the commission with the application for licensure.

(3) If an eligible applicant does not wish to participate in the establishment of offtrack wagering facilities with other eligible applicants, he shall so state in writing within thirty days of receipt of notification, a copy of which shall be included with the application for licensure submitted by any other eligible applicants.

C. Ownership of offtrack wagering facilities in parishes whose parish seat is fifty-five miles or more from any pari-mutuel facility shall be determined by the following procedure:

(1) Any applicant eligible for licensure of an offtrack wagering facility desiring to establish such a facility in a parish covered by this Subsection shall provide written notification of this intent to the commission.

(2) The commission shall notify all other eligible applicants under the provisions of this Part of this intent.

(3) All eligible applicants must respond within thirty days of receipt of this notice of intent if they wish to participate in the joint ownership of an offtrack wagering facility in that parish. Ownership shall be distributed equally among eligible applicants who choose to participate, unless agreed to and contracted otherwise by such eligible applicants. Applicants who fail to respond within thirty days will not be eligible to participate in any offtrack wagering facility in the parish.

(4) All eligible applicants indicating their wish to participate in joint ownership of an offtrack wagering facility must submit a joint application for licensure pursuant to the provisions of R.S. 4:214.

LOUISIANA REVISED STATUTES
TITLE 36. ORGANIZATION OF EXECUTIVE BRANCH OF STATE GOVERNMENT
CHAPTER 1. GENERAL PROVISIONS

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Current through all 1999 Regular Session Acts

§ 4. Structure of executive branch of state government

A. In accordance with the provisions of Article IV, Section 1 and Article XIV, Section 6 of the Constitution of Louisiana, all offices, boards, commissions, agencies, and instrumentalities of the executive branch of state government, whether constitutional or statutory, and/or their functions, powers, duties, and responsibilities shall be allocated, either in the Act by which this Title was created or by legislation enacted subsequent thereto, within the departments listed in this Section, except as provided in Subsections B and C hereof, and in order to comply with this constitutional mandate, the agencies of the executive branch of state government hereinafter enumerated, whether heretofore created by the constitution or by statute, and/or their functions, powers, duties, and responsibilities are allocated, in the manner hereinafter set forth in this Title, within the following designated departments:

(1) Department of State Civil Service

(2) Department of Economic Development . . .

§ 109. Transfer of boards, commissions, departments, and agencies to Department of Economic Development

A. The transfers and abolitions of agencies hereinafter made in this Section shall be effective as provided in Chapter 24 of this Title.

B. The following agencies, as defined in R.S. 36:3, are transferred to and hereafter shall be within the Department of Economic Development, as provided in R.S. 36:801:

(1) The Louisiana State Racing Commission (R.S. 4:141, et seq.)

LOUISIANA REVISED STATUTES
TITLE 42. PUBLIC OFFICERS AND EMPLOYEES
CHAPTER 1. TERMS OF OFFICE OR EMPLOYMENT

§ 5. Meetings of public bodies to be open to the public

A. Every meeting of any public body shall be open to the public unless closed pursuant to R.S. 42:6, R.S. 42:6.1, or R.S. 42:6.2.

B. Each public body shall be prohibited from utilizing any manner of proxy voting procedure, secret balloting, or any other means to circumvent the intent of R.S. 42:4.1 through R.S. 42:8.

C. All votes made by members of a public body shall be viva voce and shall be recorded in the minutes, journal, or other official, written proceedings of the body, which shall be a public document.

LOUISIANA REVISED STATUTES
TITLE 49. STATE ADMINISTRATION
CHAPTER 13. ADMINISTRATIVE PROCEDURE

§ 950. Title and form of citation

This Chapter shall be known as the Administrative Procedure Act and may be cited as the Administrative Procedure Act.

§ 951. Definitions

As used in the Chapter:

(1) "Adjudication" means agency process for the formulation of a decision or order.

(2) "Agency" means each state board, commission, department, agency, officer, or other entity which makes rules, regulations, or policy, or formulates, or issues decisions or orders pursuant to, or as directed by, or in implementation of the constitution or laws of the United States or the constitution and statutes of Louisiana, except the legislature or any branch, committee, or officer thereof, any political subdivision, as defined in Article VI, Section 44 of the Louisiana Constitution, and any board, commission, department, agency, officer, or other entity thereof, and the courts.

(3) "Decision" or "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing, and including non-revenue licensing, when the grant, denial, or renewal

of a license is required by constitution or statute to be preceded by notice and opportunity for hearing.

(4) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.

(5) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency, except that an agency is a "person" for the purpose of appealing an administrative ruling in a disciplinary action brought pursuant to Title 37 of the Louisiana Revised Statutes of 1950 prior to the final adjudication of such disciplinary action.

§ 955. Adjudication; notice; hearing; records

A. In an adjudication, all parties who do not waive their rights shall be afforded an opportunity for hearing after reasonable notice.

B. The notice shall include:

(1) A statement of the time, place, and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes and rules involved;

(4) A short and plain statement of the matters asserted.

If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

C. Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

D. Unless precluded by law, informal disposition may be made of any case of adjudication by stipulation, agreed settlement, consent order, or default.

E. The record in a case of adjudication shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered or a resume thereof if not transcribed;

(3) A statement of matters officially noticed except matters so obvious that statement of them would serve no useful purpose;

(4) Offers of proof, objections, and rulings thereon;

(5) Proposed findings and exceptions;

(6) Any decision, opinion, or report by the officer presiding at the hearing.

F. The agency shall make a full transcript of all proceedings before it when the statute governing it requires it, and, in the absence of such requirement, shall, at the request of any party or person, have prepared and

furnish him with a copy of the transcript or any part thereof upon payment of the cost thereof unless the governing statute or constitution provides that it shall be furnished without cost.

G. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 961. Licenses

A. When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Chapter concerning adjudication shall apply.

B. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

C. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in

its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

§ 964. Judicial review of adjudication

A. (1) Except as provided in R.S. 15:1171 through 1177, a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review under this Chapter whether or not he has applied to the agency for rehearing, without limiting, however, utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy and would inflict irreparable injury.

(2) No agency or official thereof, or other person acting on behalf of an agency or official thereof shall be entitled to judicial review under this Chapter.

B. Proceedings for review may be instituted by filing a petition in the district court of the parish in which the agency is located within thirty days after mailing of notice of the final decision by the agency or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

C. The filing of the petition does not itself stay enforcement of the agency decision. The agency may

grant, or the reviewing court may order, a stay ex parte upon appropriate terms, except as otherwise provided by Title 37 of the Louisiana Revised Statutes of 1950, relative to professions and occupations. The court may require that the stay be granted in accordance with the local rules of the reviewing court pertaining to injunctive relief and the issuance of temporary restraining orders.

D. Within thirty days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

E. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

F. The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not

shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

(7) In cases covered by R.S. 15:1171 through 1177, manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

§ 965. Appeals

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate circuit court of appeal. The appeal shall be taken as in other civil cases.

APPENDIX C

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 99/CA/1001
C/W NO. 99/CA/1002

JEFFERSON DOWNS CORP., ET AL.

versus

LOUISIANA STATE RACING COMMISSION
Suit No. 92-20961 c/w Suit No. 95-15331, Division "G"
Civil District Court for the Parish of Orleans

APPELLANT'S ORIGINAL BRIEF ON APPEAL FROM A RULING IN A CIVIL PROCEEDING BY THE HONORABLE ROBIN GIARRUSSO

SUBMITTED BY:

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JURISDICTION

Appellant shows that the Court of Appeal has jurisdiction over this matter under La. Const. of 1974, Art. 5 § 10, LSA-C.C.P. art. 2081, et seq. and Rule 1-3, "Scope of Review," Uniform Rules-Courts of Appeal.

STATEMENT OF THE CASE

Livingston Downs Racing Association, Inc. ("LDRA"), appellant in the above entitled and numbered cause, appears herein to appeal the trial court's grant of the Motion to Dismiss filed by the Louisiana State Racing Commission ("Commission") by the Honorable Robin Giarrusso on December 4, 1998. On November 15, 1996 the parties and this court entered into a consent judgment (a copy of which is attached to LDRA's opposition to the

motion to dismiss as Exhibit "A") which provides in pertinent part:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.
>
> 7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.
>
> 8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).
>
> 9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and

financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

At the time that the consent judgment was entered into by and between the parties and the court, this case was on remand to Judge Giarrusso, Division "G", Civil District Court, Parish of Orleans by virtue of writs of certiorari issued by the Fourth Circuit Court of Appeal, State of Louisiana. The Fourth Circuit reversed and set aside Judge Giarrusso's previous ruling dismissing LDRA's suspensive appeal from the Commission's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 9:158. The Fourth Circuit

further recalled Judge Giarrusso's stay order of May 23, 1996. Therefore, LDRA's suspensive appeal was in effect and the action of the Commission revoking LDRA's license was reversed.

On August 30, 1996 LDRA named current and former Commission members, Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas, together with Melinda Tucker, former attorney for the Commission, as defendants in a suit filed in U.S. District Court, Middle District of Louisiana captioned *Livingston Downs Racing Association, Inc. v. Jefferson Downs Corporation, et al.*, Civil Action No. 96-3430-B-M1. Among the allegations contained in the petition were conspiracy to violate anti-trust and restraint of trade and § 1983 Civil Rights violations for illegal actions under color of state law.

Shortly thereafter, the Commission defendants approached LDRA to discuss a resolution of the issues. LDRA had no desire to harm individual members. LDRA's only desire was to move forward with its efforts to build its race track project. LDRA only wanted the Commission to cease its efforts in violation of the racing statutes which interfered with LDRA's efforts to build its race track. If the Commission would not follow its mandate under the racing statutes to assist LDRA in its efforts, then it at least should not cause further interference and delays.

With these objectives in mind, LDRA negotiated the consent judgment, and in return dismissed the Commission defendants from the federal lawsuit.

Had the parties not entered into a consent judgment, the issue of the license revocation would have proceeded to trial on the merits in Judge Giarrusso's court. The record and law clearly supported LDRA's position. Furthermore, the some [sic] Commission members would have faced an expensive trial in federal court, with significant exposure to personal monetary damages. It is now apparent that LDRA negotiated the consent judgment in good faith. The Commission members, on the other hand, negotiated in bad faith to secure a release to their benefit and simply waited for an opportunity to retaliate and punish LDRA.

On August 18, 1998 Terrence Lee Odom dismissed with prejudice his pending appeal in the matter entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish (the "Odom suit"). This suit constituted a serious impediment to LDRA obtaining a financing commitment because this litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of horse racing in Livingston Parish. A copy of the dismissal order signed by the First Circuit Court of Appeal is attached to LDRA's opposition to the motion to dismiss as Exhibit "B".

As soon as the dismissal was ordered, LDRA sent a written request to the Commission for an extension of the October 31, 1998 deadline contained in the Consent Decree. A copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "C".

On September 17, 1998 the Commission advised Mr. Jude Bursavich, counsel for LDRA, that the Commission

was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further informed Mr. Bursavich that LDRA had not been placed on the agenda of the Commission's September 26, 1998 meeting. However, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline. A copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "D". A meeting notice was forwarded to Mr. Bursavich. A copy of the meeting notice is attached to LDRA's opposition to the motion to dismiss as Exhibit "E".

The Commission purportedly held the meeting on Saturday, September 26, 1998. On information and belief, the Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. Therefore, the subsequent letter of October 22, 1998 denying LDRA's request is in violation of the Open Meetings Law.

The Commission has failed to produce any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on LDRA's request for an extension. On September 23, 1998 Mr. Victor Sachse, III, counsel for LDRA, issued a letter to the attorney for the Commission and forwarded several documents to the Commission for its consideration at its September 26, 1998 meeting. A

copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "F". LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. A copy of these letters are attached to LDRA's opposition to the motion to dismiss as Exhibits "G" and "H," respectively. On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered a commitment to the Commission office in New Orleans, Louisiana. A copy of the commitment is attached to LDRA's opposition to the motion to dismiss as Exhibit "I". LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said commitment. Instead, unknown actors arbitrarily and capriciously rejected said commitment without even communicating with the lender or LDRA. The action of the unknown actors is in direct violation of the Administrative Procedure Act, is in bad faith, violates the spirit of the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974.

On November 10, 1998 counsel for the Commission, without legal authority, filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to Mr. Sachse which was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter

timely. However, the Commission has not even acknowledged receipt of said commitment or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." A copy of this letter is attached to LDRA's opposition to the motion to dismiss as Exhibit "J". This communication was provided by Mr. Matthew E. McManus, Partner of RFG. The Commission simply, in bad faith, breached its agreement with LDRA and therefore, the case should be reinstated before the trial court.

On November 18, 1998 Claude F. Reynaud, Jr., counsel for LDRA filed a motion to continue the hearing on the defendant's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was advised that said clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for LDRA again contacted Judge Giarrusso's office and was advised by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and advise that LDRA would be allowed oral argument on the motion.

ACTION OF THE TRIAL COURT

On December 4, 1998 the motion was scheduled for hearing before Judge Giarrusso. Despite the fact numerous exceptions were filed by LDRA, along with a petition for writ of mandamus and a motion to enforce Section 16 of the consent judgment, the hearing lasted less than ten minutes. After a brief opening statement by counsel for the Commission, Judge Giarrusso recognized Mr. Victor Sachse, III, counsel for LDRA. Mr. Sachse noted that Mr. Paul Burgess, Executive Director of the Commission, and Ms. Kim Chatelain, counsel for the Commission, were present. Mr. Sachse requested that the Judge issue an instanter subpoena to these two parties in order to establish that there had been no official action taken by the Commission which authorized the filing of the subject motion to dismiss. Judge Giarrusso responded by advising Mr. Sachse that he could get them (the subpoenas) from the Fourth Circuit because she was granting the motion to dismiss. Judge Giarrusso advised Ms. Chatelain to draw up the order and that she would sign the order the same day. The hearing was then concluded and the order of dismissal was signed on December 4, 1998 within hours of the hearing.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting the motion to dismiss and overruling all exceptions without a contradictory hearing when the Commission had taken no official action to authorize the filing of the motion to dismiss in clear violation of LSA-R.S. 42:6, et seq.

2. The trial court erred in failing to address the issue that the Commission failed to follow the procedures

dictated by LSA-R.S. 49:961, which deals with revocation of a license and LSA-R.S. 49:955 which governs adjudicatory proceedings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Commission, as an administrative agency, is required to comply with the provisions of the Open Meetings Law, LSA-R.S. 42:6, et seq.

2. Whether the Commission's motion to dismiss is a violation of the Open Meetings Law when the Commission had taken no official action to authorize the filing of the motion to dismiss in clear violation of LSA-R.S. 42:6.

3. Whether the Commission, as an administrative agency, is required to comply with the provisions of the Administrative Procedure Act governing revocation of a license, LSA-R.S. 49:961 and governing adjudicatory hearings, LSA-R.S. 49:955.

4. Whether the Commission's motion to dismiss is a violation of the provisions of the Administrative Procedure Act governing revocation of a license, LSA-R.S. 49:961 and governing adjudicatory hearings, LSA-R.S. 49:955.

5. Whether the trial court's ruling is in effect a final ruling upholding the original action taken by the Commission to revoke LDRA's license and therefore, the original ruling of the Commission is the proper subject matter before the Court in this appeal.

ARGUMENT OF ASSIGNMENTS OF ERROR

A. Argument of Assignment of Error No. 1

The settlement agreement, which is the subject of the motion to dismiss is a contract between the plaintiff and the defendant in the form of a consent judgment, which was approved by the Commission in open meeting in compliance with the statutes.

The Commission's actions are governed by the Administrative Procedures Act and by LSA-R.S. 42:6, the open meetings law. There exists no authority for the Commission's attorney or the Commission's chairman to unilaterally take action on behalf of the Commission without first having the matter heard by the full Commission and a vote taken on the subject matter. There is no record of this matter being heard in open meeting, therefore, there is no legally authorized motion before this Court.

There is no record of any meeting of the Commission to discuss the alleged breach of the consent judgment and/or to authorize the filing of the motion to dismiss. At best, it may be argued that a telephone poll was taken. However, Attorney General Opinion No. 88-340, August 19, 1988 states:

> A telephone poll cannot be used to authorize action by a board; this would result in a violation of the open meeting requirement.
>
> A telephone poll would be in clear violation of LSA-R.S. 42:5.

LSA-R.S. 42:9[1] gives clear authority for this court to dismiss the Commission's motion to dismiss. LDRA's challenge in the form of its exception falls within the sixty day time limit.

It has been subsequently learned that a meeting of the Commission's legal committee was allegedly held at the office at the office [sic] of Albert Stall, Commission Chairman on November 4, 1998. If held, this meeting was not held in accordance with LSA-R.S. 42:5. Furthermore, this committee was without power to authorize the filing of the motion to dismiss. Attorney General Opinion No. 76-1399, October 13, 1976 states:

> Committee meetings or executive sessions of public body are subject to open meeting laws *even if no final action can be taken at such meeting or session.*

B. Argument of Assignment of Error No. 2.

The underlying purpose of the Commission's actions are to finally revoke all licenses issued by the Commission to the plaintiff. Clearly, the allegation of defendant's motion constitutes a finding of fact and the motion to dismiss is clearly an adjudication. The arguments presented herein apply to the current actions of the

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[1] LSA-R.S. 42:9 Voidability.

Any action taken in violation of R.S. 42:4.1 through 42:8 shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action.

Commission as well as the previous actions of the Commission which were the basis of the suspensive appeal by LDRA.

The procedures to be followed in an adjudication are outlined in LSA-R.S. 49:955. In *Tafaro's Inv. Co., Inc. v. Division of Housing, Inc.*, 261 La. 183, 259 So.2d 57 (1972) the court wrote:

> Where administrative agency adjudicates private property rights and obligations, parties must be afforded an opportunity to be heard, and, if private rights cannot otherwise be protected and there is no compelling public interest for summary action, there must be a full hearing before administrative actions.

Here, the Commission made absolutely no attempt to comply with the law and there is no compelling public interest to rush to judgment.

In addition to the statutory requirements of LSA-R.S. 49:955, in the matter of a license application, LSA-R.S. 49:961 imposes special conditions. More specifically, R.S. 49:961(C) reads in pertinent part:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, *prior* to the institution of agency proceedings, the agency gives notice to the licensee of facts or conduct which warrants the intended action, *and the licensee is given the opportunity to show compliance with all lawful requirements for the retention of the license.* (Emphasis ours.)

In *La. State Board of Medical Examiners v. Bertucci*, 598 So.2d 798 (La. App. 4th Cir. 1992), the court wrote:

> Though under Administrative Procedure Act, notice and opportunity to be heard are required in any adjudication proceeding, *additional step* is required with respect to suspension, revocation, annulment or withdrawal of an existing license, whereby agency must give licensee an opportunity, *prior* to institution of formal proceedings, to show that the actions complained of do not violate the law or agency rules.

Here, LDRA in a good faith effort to comply with the consent decree, filed an application to reinstate its license and provided the Commission with a commitment for $10 million in financing. Without contacting or advising LDRA, or its lender, unknown persons acting without authority, flatly rejected LDRA's application and arbitrarily and capriciously declared that the commitment letter was not binding and enforceable. Subsequent to learning of the Commission's actions, LDRA's lender, RFG wrote to the Commission and offered to amend the commitment to meet the arbitrary objections to the commitment.

The very purpose of administrative procedures as directed by *Bertucci, supra*, was to allow licensed persons to respond to allegations set forth by the licensing agency with the objective of allowing the licensee to cure any problems without the need to proceed to a revocation hearing. Here, the Commission raised a laundry list of frivolous attacks on the provisions of a financing agreement between two parties, both of whom consider themselves bound by the commitment. Both parties to the agreement offered to meet with the Commission to amend the commitment to remove any objections, either real or frivolous, to the satisfaction of the Commission.

Had the Commission followed the Administrative Procedure Act, all differences could have been resolved and the motion to dismiss would have been unnecessary.

LDRA respectfully urges this Honorable Court to send a strong message to the Commission that it is required to follow the laws of this State and its own rules.

CONCLUSION

LDRA made a reasonable request to extend the time frames under the consent judgment due to the fact that the Odom suit made it impossible for LDRA to obtain financing. For over six years no other party has expressed an interest in building a race track to provide live racing dates desperately needed by the Louisiana horse industry. One may question the need to rush to judgment and get rid of LDRA. Can it be only coincidence that on November 14, 1999, just four days after the Commission's motion to dismiss the Fair Grounds filed a motion for summary judgment in the federal anti-trust? The motion listed in detail the Commission's actions as a major defense to the allegations set forth in LDRA's complaint. Is it further coincidence that the so-called legal committee of the commission included Albert Stall, Oscar Tolmas and Payton Covington who were former co-defendants with the Fair Grounds in the federal anti-trust lawsuit? Had the Commission performed its obligations under the consent judgment and followed the procedures as required by the Administrative Procedure Act it could not have accommodated the Fair Grounds' motion for summary judgment.

The Commission did not properly perform its duties according to statute or in good faith. This motion was improperly before the trial court.

It is clear from the series of events and documentation provided that Section 16 of the consent judgment is applicable and that appellant LDRA, not the Commission, is entitled to seek appropriate relief before the trial court. The Commission, in bad faith, breached its agreement with LDRA and therefore, this case should be reinstated before the trial court.

While this appeal addresses the ruling of the trial court on the motion to dismiss, it does not end the controversy. The whole matter begins with the illegal manner in which the Commission revoked the racing licenses and permits to LDRA. Facing probability of an adverse ruling, the Commission has consistently delayed the inevitable. LDRA is faced with a "catch-22" situation. The Commission alleges that LDRA's license must be revoked because it does not have financing. On the other hand, LDRA cannot get financing for a race track development without assurance of a racing license. In the meantime the horsemen and state and local governments are deprived of revenue and the people of Livingston Parish are deprived of jobs.

The trial court's ruling has the actual effect of upholding the Commission's action in revoking LDRA's license. Therefore, this Court has before it the original appeal of the Commission's ruling which was apparently upheld by the trial court's grant of the Commission's motion to dismiss. This issue has more than once been before this Court. The central issue has been thoroughly

briefed and this Court has before it a complete record from which to reach its decision. We respectfully urge that the Court issue a final ruling on the issue of the license revocation. Given reasonable time without any barriers erected by the Commission or competitors, LDRA can move forward with its race track development.

Respectfully submitted:

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on opposing counsel by facsimile and by placing same in the United States mail, postage prepaid and properly addressed this 2nd day of June, 1999.

/s/ Darlene S. Ransome
Darlene S. Ransome

EXHIBIT

Appendix 1

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NOS. 92-20961 c/w
95-15331

DIVISION "G"
SECTION "11"

DOCKET:

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

JUDGEMENT

The above captioned proceeding came for hearing on the merits of defendant, LOUISIANA STATE RACING

COMMISSION, Motion To Dismiss on Friday, December 4, 1998:

PRESENT: KIM RAINES CHATELAIN,
Attorney for defendant, Louisiana State Racing Commission

VICTOR A. SACHSE, III
Attorney for plaintiff, Livingston Downs Racing Association, Inc.

DARLENE S. RANSOME
Attorney for plaintiff, Livingston Downs Racing Association, Inc.

After considering the law, the evidence, and for the reasons orally assigned

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Louisiana State Racing Commission, dismissing the above captioned suit by plaintiff, Livingston Downs Racing Association, Inc. against defendant, Louisiana State Racing Commission, with prejudice at plaintiff's cost pursuant to the Consent Judgment entered November 15, 1996.

JUDGMENT READ, RENDERED AND SIGNED this 4 day of December, 1998.

(Sgd.) Robin M. Giarrusse
JUDGE

APPENDIX D

[Exhibits Omitted In Printing]

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

No. 99-CA-1001

Jefferson Downs, Inc. et al
versus
Louisiana State Racing Commission
No. 92-20961, Division "G"

consolidated with

LIVINGSTON DOWNS RACING ASSOCIATION, INC.
Plaintiff/Appellee

VERSUS

LOUISIANA STATE RACING COMMISSION

No. 95-15331, DIVISION "J" TRANSFERRED TO "G"

consolidated with

Livingston Downs Racing Association, Inc.
versus
Louisiana State Racing Commission
No. 97-12435, Division "K" transferred to "G"

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

APPELLEE'S ORIGINAL BRIEF

(Filed July 19, 1999)

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[Table of Contents and Authorities Omitted In Printing]

MAY IT PLEASE THE COURT:

Defendant-appellee, Louisiana State Racing Commission, submits the following original brief in response to plaintiff-appellant appeal to this Honorable Court:

This matter comes on appeal from a district court judgment granting defendant's motion to dismiss pursuant to the terms of a consent judgment entered on November 15, 1996.

The purpose of the consent judgment was to afford Livingston Downs two additional years to rehabilitate and make itself financially able to fulfill its obligations under a license to conduct horse racing in Livingston Parish. The Consent Judgment suspended Livingston Downs license further providing that within two years Livingston Downs must submit a new application which included a binding, enforceable commitment letter(s) in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS for the construction of a racing facility, oval and backside or the case be [sic] shall be DISMISSED.

Livingston Downs failed to timely submit an application with a binding, enforceable commitment letter under the terms of the Consent Judgment. The case was dismissed.

This brief will first set forth an [sic] concise introduction explaining to the court how this matter has come before it and the history between the parties leading to the Consent Judgment.

The argument will follow: first stating the issue on appeal and then responding by applying the law as it relates to the facts set forth.

Introduction:

Livingston Downs Racing Association, Inc. ("Livingston Downs") has squandered years blaming others for their inability to construct, open and operate a race track in Louisiana embroiling the State of Louisiana, the Commission, individual Commissioners and others in needless and exhaustive litigation.

First, Livingston Downs blamed the State of Louisiana for being unable to obtain an off-track wagering license arguing no race track in Louisiana could economically survive without off track wagering revenue. This argument was abandoned when the state Supreme Court upheld the constitutionality of a statute which prevents Livingston Downs from ever securing an off-track wagering license.[1] Still, it sued the Commission for off track wagering rights it did not have.[2]

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[1] La.R.S. 4:211(5); **Livingston Downs Racing Assoc., Inc. v. State of Louisiana, et al,** La. No. 96-CA-2890.

[2] **Livingston Downs Racing Assoc. v. La. State Racing Comm'n,** No. 97-12435, Div "K" c/w No. 95-15331 "J" c/w No. 92-20961 "G", Civil District Court, Orleans Parish, Louisiana; 4th Circuit Court of Appeal No. 98-CA-1229 (affirming trial court judgment to dismiss suit).

Next, Livingston Downs blamed both those who opposed the racetrack and those, the Commissioners, who approved it.[3]

Finally, Livingston Downs blamed the Commission pretermitting it was the Commission who first granted Livingston Downs a license.

The seven years of Livingston Downs litigation extends over three parishes and involves numerous appeals.

The instant action arises from the Commission's decision on August 29, 1994 to withdraw, revoke and terminate the ten (10) year license issued on May 27, 1993 to Livingston Downs and a license and/or permit issued on August 26, 1993 to conduct a live race meet.

Livingston Downs filed a Petition for Trail De Novo and Suspensive Appeal to the 21st Judicial District Court, Livingston Parish, Louisiana appealing the Commission's decision.[4] The matter was transferred to Civil District Court pursuant to La.R.S. 4:145.1 and consolidated with a related matter.[5] The case was subsequently dismissed as untimely. The Fourth Circuit Court of Appeal reversed

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[3] **Livingston Downs Racing Assoc., Inc. v. Jefferson Downs Core., et al,** La.M.D., No. 96-3430.

[4] **Livingston Downs Racing Assc. v. La. State Racing Comm'n,** No. 71,137, 21st Judicial District Court, Livingston Parish, Louisiana.

[5] **Livingston Downs Racing Assc., Inc. v. La. State Racing Comm'n,** No. 95-15331, Div "J" c/w **Jefferson Downs, Inc. et al v. La. State Racing Comm'n,** No. 92-20961, Div. "G", Civil District Court, Orleans Parish, Louisiana.

and remanded the matter for further proceedings.[6] The court did not, as Livingston Downs represents, reverse the Commission's decision but reinstated the suspensive appeal. Thereafter, the suit was eventually resolved by the Consent Judgment, attached hereto for ready reference.

The Consent Judgment was part of a larger settlement between Livingston Downs and the Commission entered into in November 1996. Referenced by Livingston Downs in its original brief to the court, the settlement agreement is **de hors** the record but a copy is attached hereto should the court wish to review it.

At the time, Livingston Downs confronted issues brought by the juxtaposition of retaining the racing licenses while avoiding its responsibilities. It faced an independent audit by the Commission pursuant to 4:153 regarding Livingston Downs failure or financial inability to fulfill the purpose for which its licences were issued, ie. live horse racing, as well as a hearing on a rule to show cause why it should not be responsible for minimum license fees totaling $200,000. Most importantly, Livingston Downs risked an adverse ruling following a trial on the merits.

The settlement, including the Consent Judgment, entered into by Livingston Downs and the Commission was approved by the Commission on November 15, 1996 in an Open Meeting held in accordance with La.R.S. 42:6.

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[6] **Livingston Downs Racing Assoc., Inc. v. La. State Racing Comm'n,** 675 So.2d 1214 (La.Ct.App. 4th Cir. 1996).

The Consent Judgment provides that the license issued to Livingston Downs shall be suspended and the Commission shall not except as provided be required to consider Livingston Downs as a licensed racing association. The Consent Judgment further provided the following:

1. that the Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish;

2. that any application for permits or license to be issued to Livingston Downs Racing Association shall include within the application **"binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS"** which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside;

3. the commitment must issue from source suitable to and acceptable to the Commission, after prompt investigation.

At no time was the terms of the settlement nor the Consent Judgment contingent upon the resolution of any other pending litigation.

Yet, Livingston wrote the Commission, just as the deadline approached, requesting a one year extension now citing a recent resolution of certain pending litigation as the delay. Under no obligation to respond to the request, the Commission considered the request in an executive session convened under the Open Meeting law on September 26, 1998 before advising by letter:

"As you are aware, the terms and conditions of the Consent Judgment were reached only after exhaustive and extensive negotiations by both sides the purpose of which was to provide a [sic] amicable means to an end to multiple litigations.

The Commission remains committed to abide by the terms of the Consent Judgment as entered."

On October 30, 1998 the Commission received via fax the following documents:

1. an application by Livingston Downs Racing Association, L.L.C. (not Livingston Downs Racing Association, Inc.) for racing licenses;

2. financial Statement of Livingston downs Racing Association, L.L.C.;

3. Balance sheet of Livingston Downs Racing Association, Inc.

4. A **"Conditional Commitment for Collateralized Mortgage Financing"** by Remington Financial Group, Inc. to applicant Mr. A1 J. Ransome, Livingston Downs Racing Association, Inc.

The Conditional Commitment for Collateralized Mortgage provides the commitment is not valid unless a copy of such commitment is dated, signed by Borrower and Lender, and returned on or before November 10, 1998. The documents received by fax on October 30, 1998 did not have attached thereto any signature page for the Conditional Commitment. An original application and a copy of the Commitment with the signature page was

later received via federal express on Monday, November 1, 1998.

On November 10, 1998, the Commission filed a Motion to Dismiss as provided by the Consent Judgment contending that Livingston Downs failed to satisfy the terms and conditions of the Consent Judgment in the following particulars:

1. The Conditional Commitment for Collateralized Mortgage Financing is not a binding and enforceable commitment in an amount not less than Ten Million ($10,000,000.00) Dollars;

2. The Conditional Commitment allows for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group, Inc. subordinating the Commission regulatory authority under La.R.S. 4:147(4) to that of another.

3. The application for license was not made by Livingston Downs Racing Association, Inc. now known as ALDAR, Inc. but by Livingston Downs Racing Association, L.L.C. a separate and distinct legal entity from the party to this suit.

The motion was set for contradictory hearing in Civil District Court on December 4, 1998 and Livingston Downs was served with notice through its counsel of record. Following the argument of counsel and after considering the law and evidence, the court dismissed the suit at plaintiff's cost in accordance with the terms of the Consent Judgment.

Livingston Downs now appeals this ruling.

ARGUMENT

Livingston Downs makes two assignment [sic] of errors. First, it argues the trial court erred in granting the motion to dismiss because the Commission has failed to comply with the mandates of the Administrative Procedure Act and/or Open Meeting Law. Secondly, Livingston Downs urges the motion to dismiss constituted a finding of fact and was an improper adjudication of a license.

These assignments of error have little to do with the issue before the trial court and only valid issue on appeal and that is whether Livingston Downs timely complied with the terms of the Consent Judgement entered into between the parties and made the judgment of the court in this matter. More specifically, has Livingston Downs submitted to the Commission with an application a **"binding, enforceable commitment letter(s) in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS"**.

It is of no moment under the Consent Judgment how the issue came to be heard by the trial court. If the trial, and this court, cannot find as a matter of law that Livingston Downs timely submitted an application which included a binding, enforceable commitment letter then neither could the Commission. If the Commission could not and Livingston Downs has not, the case must be dismissed none of which pretermit Livingston Downs at any later date upon its financial ability to re-apply.

Livingston Downs did not satisfy the terms of the Consent Judgment nor has it submitted to the Commission a binding, enforceable commitment letter.

Because the issue is dispositive, the Commission will first address whether Livingston Downs complied with the terms of the Consent Judgment. Thereafter, the merits of Livingston Downs assignment of errors will be separately addressed.

1. Application Failed To Include Binding, Enforceable Commitment Letter

Livingston Downs represents to the court that it filed an application to the Commission, which was arbitrarily and capriciously rejected, but nowhere does Livingston Downs state the application included a binding, enforceable commitment letter per the terms of the Consent Judgment.

The document entitled **"Conditional Commitment For Collateralized Mortgage Financing"** made a part of the application by Livingston Downs, L.L.C. purportedly provides for financing in the "maximum amount of Ten Million ($10,000,000.00) Dollars but is subject to and conditioned upon performance and/or satisfaction of additional terms, provisions and conditions the performance and/or satisfaction of which is based on the **"sole and absolute discretion of Remington Financial Group, Inc."**. A copy of the commitment is attached hereto for ready reference. These terms and conditions include by way of example:

1. "[t]he loan amount ("Loan") will be in the principle amount of $10,000,000. Said loan

amount shall not exceed 80% of subject property's Fair Market Value.

2. "[t]his Loan commitment is contingent on Borrower having the capability, **in its sole discretion** of Lender, of servicing and repaying of Loan in accordance with its terms";

3. "[alt and in all events, this Loan commitment is subject to Lender's approval **in its sole discretion** of all necessary documentation relating to Borrower, Project and Collateral;

First, the Conditional Commitment is not enforceable as it is replete with suspensive conditions the satisfaction of which is wholly contingent on the sole discretion of lender, Remington Financial. La.C.C. art. 1770 provides that a suspensive condition that depends solely on the will of the obligor makes the obligation null.

An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. **Willowood Condominium Association, Inc., et al v. HNC Realty Company et al,** 531 F.2d 1249 (5th Cir. 1976). The **Willowood** court found that a 4.7 million dollar loan commitment is not a casual endeavor but an enterprise carefully entered into by each party. In that case, there was no delineation of essential elements of a loan including failure to set forth with specificity how and when interest on the loan would be adjusted or paid, how and when disbursements would take place or [sic] a mortgage. Further, the purported commitment letters implied there would be further negotiations which would take place. Here, the court held that a letter setting forth terms upon which a loan to developers would be made subject

to approval of a loan committee which failed to include essential terms of a loan was not an enforceable loan commitment. (**Willowood,** at 1252) (citing **Wheeler v. White** 385 S.W.2d 619 (1964), rev'd on other grounds, 398 S.W.2d 93 (1965) holding that a loan commitment which provided the principal amount of loan, interest, and term but failed to provide amount of monthly payments was unenforceable.)

The Conditional Commitment provided by Livingston Downs is likewise nothing more than a letter setting forth terms upon which a loan may be made but is not in and of itself an enforceable loan commitment. There is no funding date specified; while the term of the note may be set at 60 months, there is no monthly payment set forth; rate of interest is not set forth-with specificity; there is no commitment fee paid which is evidenced by the writing; and it implies the need for substantial further negotiation as the writing is entirely subject to the discretion of the lender or investors the author of the commitment may find.

Next, the Consent Judgment required a binding, enforceable loan commitment of not less than Ten Million ($10,000,000) Dollars. The "loan commitment" provided is not for an amount not less than Ten Million ($10,000,000) Dollars but for an amount not to exceed Ten Million Dollars providing the fair market value of the project is worth at least Twelve Million Five Hundred Thousand ($12,500,000) or 80%.

Finally, the Conditional Commitment allows for ownership in the "project" by unknown persons at the sole

discretion of Remington Financial Group, Inc. **See** Paragraphs 7, 8 & 11 of Commitment.

La.R.S. 4:147 (4) requires each applicant seeking license as a racing association to set forth the names of the stockholders and directors of the corporation.

The Conditional Commitment implies that RFG and/or subsequent unknown investors will have an ownership interest in the "project" as a condition of financing. When, where, how and in what form this interest may manifest itself is unknown and undisclosed to the Commission at this time. However, in any event such a condition inevitably subordinates the Commission's regulatory authority under La.R.S. 4:147 to that of the financier of the "project".

2. Livingston Downs Racing Association, Inc. Has Not Made Application

The terms of the Consent Judgment provided that the Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish.

Livingston Downs Racing Association, Inc. did not make application to the Commission for a ten year license. Rather, Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity not previously licensed by the Commission, made application to the Commission. **See,** Vol. 1 of 2 at p. 89, Motion to Dismiss exh. 1 **in globo.**

Livingston Downs Racing Association, Inc. is a Louisiana corporation formed in October 1992 by A1 Ransome

who is registered agent and president. There were no other officers or directors. The licenses and permits at issue in this litigation were granted to Livingston Downs Racing Association, Inc.

In October 1998, Livingston Downs Racing Association, Inc. changed its name to ALDAR Investments, Inc. **See** Vol 1 of 2 at p. 120, Motion to Dismiss, exh. 2, **in globo.**

At or about the same time, Darlene S. Ransome now acting as agent for ALDAR, Inc. formerly known as Livingston Downs Racing Association, Inc. formed Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity. The limited liability company articles of incorporation are signed by Darlene Ransome and Al Ransome for Livingston Downs Racing Association, L.L.C. **See** Vol. 1 of 2 at p. 120, Motion to Dismiss, exh. 2, **in globo.**

Livingston Downs Racing Association, L.L.C., not plaintiff herein, makes application to the Commission for license. However, the limited liability company attaches to its application Livingston Downs Racing Association, Inc. income statement and balance sheet. According to its balance sheet, Livingston Downs Racing Association, Inc. holds approximately $1 million in assets but $2 million in liabilities. **See** Vol 1 of 2 at p. 89, Motion to Dismiss, exh. 1, **in globo.**

Livingston Downs Racing Association, L.L.C. has a zero net worth.

Livingston Downs represents to the Commission that these alterations were necessary because potential

lenders expressed their desire to do business with a limited liability company rather than a corporation. **See** Vol 1 of 2, at p. 120, Motion to Dismiss, exh. 2, Letter of Darlene Ransome.

However, the Conditional Commitment is made to applicant, A1 J. Ransome and Livingston Downs Racing Association, Inc.

It is not certain or clear the need for participation and alteration of corporate forms or the addition or subtraction of officers, directors or managers.

It is clear that Livingston Downs Racing Association, Inc. has not complied with the terms of the Consent Judgment and has in fact submitted no application.

3. Livingston Downs License Is Governed By Terms of Consent Judgment

Livingston Downs assigns as an error that the Motion to Dismiss filed by the Commission constituted a finding of fact and an improper adjudication of Livingston Downs license.

The Commission adjudicated Livingston Downs license on August 29, 1994 when it withdrew and revoked Livingston Downs ten (10) year license and racing permit for its failure to meet any of its obligations connected with the fulfillment of the purpose for which the license was granted.

Whether the Commission withdrew and revoked the license without cause, as Livingston Downs contended in its original petition, was rendered moot when the parties

entered into the Consent Judgment which afford Livingston Downs two additional years under a suspended license to rehabilitate itself.

Thereafter, the Commission was relegated to Livingston Downs and had neither the authority or cause to further adjudicate Livingston Downs license.

The Consent Judgment anticipates by its terms three possible conclusions to the litigation: (a) Livingston Downs timely files an application which is approved by the Commission; (b) Livingston Downs doesn't file an application or files an application which does not comply; (c) Livingston Downs timely files an application which the Commission fails to approve or otherwise act upon.

In any case, the Consent Judgment clearly defines the remedies.

The remedy available to the Commission is provided at Paragraph 15:

> . . . in the event that Livingston Downs Racing Association, Inc. fails to file an application with a binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including grandstand, racing oval and backside, on the timetable as set forth hereinabove, then these proceedings **shall be dismissed** with prejudice at plaintiff's cost.

The remedy provided to Livingtson Downs is found at Paragraph 16 which states:

> . . . in the event an application [per Paragraph 6 with a binding, enforceable commitment letter]

> is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

These paragraphs must of course be interpreted **impari materia** with Paragraph 6 which requires in pertinent part the following:

> . . . any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc. which application are filed on its behalf and shall conform to the provisions of La.R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), **shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS,** which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

The issue before the trial court at the hearing on the Motion to Dismiss was whether Livingston Downs timely filed an application in accordance with the terms of the Consent Judgment which application must include a **binding, enforceable commitment letter in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS.**

Livingston Downs had the right to have the judge review the license application under Paragraph 16 of the

Consent Judgment and make a summary determination after contradictory hearing.

Whether the trial court considered the issue on application by Livingston Downs or on a Motion to Dismiss by the Commission, the issue came for contradictory hearing before the court.

Thus, whether the Commission's Motion to Dismiss constituted an adjudication of the license without complying with the Administrative Procedure Act 49:955 or whether it correctly availed itself of the remedy expressly provided in the Consent judgment is of no moment.

The only issue is whether the court could reasonably conclude that the application submitted by Livingston Downs on October 30, 1998 complied with the terms of the Consent Judgment and included a binding, enforceable commitment in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS. If the court could not, neither could the Commission.

3. Administrative Procedure Has No Further Application To Consent Judgment Approved In Open Meeting

Finally, Livingston Downs first assignment of error is [sic] the Commission failed to comply with the Administrative Procedure Act and Open Meeting law before filing the Motion to Dismiss.

Proceedings before the Commission are governed by the Administrative Procedure Act and Open Meeting Law. However, the Administrative Procedure Act and Open Meeting Law do not apply to pending litigations

which have gone beyond the administrative level. In fact, pending litigation is an exception to the Open Meeting requirements and may be discussed in executive session. La.R.S. 42:6.1.

The Consent Judgment and settlement were approved in accordance with the Administrative Procedure Act in an open meeting convened under the Open Meeting law. Subsequently, the Administrative Procedure Act and Open Meeting law provisions were, as to these parties, preempted by the Consent Judgment which thereafter governed the parties conduct. The motion to dismiss was filed pursuant to the terms of the Consent Judgment.

Further, the Commission is provided an assistant attorney general by statute whose duty it is to advise and represent the Commission in all legal proceedings. La.R.S. 4:146 (A).

It defies all logic to contend the Commission need hold an open meeting to convene into executive session to authorize its attorney to take every action in its defense, ie. to file exceptions, to file an answer, to file a Memorandum or brief. It is equally ridiculous to suggest that the Commission need hold an open meeting to convene into executive session and thereafter vote in open meeting to authorize its attorney to give effect to the clear language of the Consent Judgment.

CONCLUSION

Livingston Downs persists in blaming others for their financial inability to construct, open and operate a race track in Livingston Parish.

The Commission first granted a license to Livingston Downs more than six years ago. It has afforded Livingston Downs every opportunity to fulfill its obligations connected with those license [sic]. Lastly, the Commission entered into a Consent Judgment to afford Livingston Downs yet even more time, two additional years, to rehabilite [sic] and make itself financially able to open and operate race track.

What has Livingston Downs accomplished during those two years? Well, it sued for off track wagering rights, again, irrespective of a Supreme Court decision holding it could not have off track wagering. The litigation was, of course, unsuccessful. It has pursued other merit less litigation throughout the state. Over two years, Livingston Downs has been dismissed as a party and dismissed others it sued.

What Livingston Downs has not accomplished in two years is securing an enforceable, binding commitment letter(s) in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS for the construction of a racing oval, grandstand and backside in Livingston Parish Louisiana.

The Consent Judgment, made the judgment of the court, provided that upon Livingston Downs failure to accomplish this task within two years this case shall be

dismissed. The trial court appropriately dismissed the suit.

Though Livingston Downs at the conclusion of this litigation will be without a license after six years, it is without a race track. When it has the financial wherewithal to construct, open and operate a race track, it may again apply for a license.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon Counsel for all parties by telefacsimile transmission and/or by mailing the same to each properly addressed and postage prepaid on July 19, 1999.

/s/ Kim Raines Chatelain

APPENDIX E

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

STATE OF LOUISIANA, ET AL.

NO._____

IN RE: LIVINGSTON DOWNS RACING ASSOCIATION, INC. APPLYING FOR SUPERVISORY WRITS DIRECTED TO THE FOURTH CIRCUIT COURT OF APPEAL, DOCKET #99-CA-1001 CONSOLIDATED WITH DOCKET #99-CA-1002 FROM A JUDGMENT GRANTING A MOTION TO DISMISS WITH PREJUDICE THE HONORABLE ROBIN A. GIARRUSSO, JUDGE, CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, SUIT NO. 92-20961 C/W 95-15331

CIVIL CASE

Respectfully submitted:

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WRIT GRANT CONSIDERATIONS

The Fourth Circuit Court of Appeal erroneously applied the laws of this state to the facts of this case. The Court of Appeal's decision causes substantial injustice to Livingston Downs Racing Association, Inc. ("LDRA") by taking a property right from LDRA, without regard to LDRA's rights to equal protection and due process under both the state and federal constitutions. Moreover, the Court's decision significantly affects the public interest. The Court of Appeal's decision ratifies the actions (or inactions) of the Louisiana State Racing Commission (the "Commission") which are clearly in violation of both the Racing Statutes and the Administrative Procedure Act.

Additionally, the Court of Appeal's decision has so far departed from proper judicial proceedings or so abused its powers, and sanctioned such a departure or abuse by the trial court chat this Court's exercise of its supervisory jurisdiction is warranted. As shown in Section VI herein below, the trial court record of this matter is in such disarray and is so incomplete that it is impossible for an appropriate judicial determination to have been made. Having made such a determination without regard to the record of this matter is clearly a violation of LDRA's due process rights under both the state and federal constitutions.

STATEMENT OF THE CASE

On November 15, 1996 the parties entered into a consent judgment (***Appendix 1***) (hereinafter referred to as the "consent judgment") approved by the trial court which provides in pertinent part:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall frilly cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s)

> or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

At the time that the consent judgment was entered into by and between the parties and the court, this case was on remand to Judge Giarrusso, Division "G", Civil District Court, Parish of Orleans by virtue of writs of certiorari issued by the Fourth Circuit Court of Appeal, Stale of Louisiana. The Fourth Circuit reversed and set aside Judge Giarrusso's ruling dismissing LDRA's suspensive appeal from the Commission's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 9:158. The Fourth Circuit further recalled Judge Giarrusso's stay order of May 23, 1996. Therefore, LDRA's suspensive appeal was in effect and the action of the Commission revoking LDRA's license was reversed.

On August 30, 1996 LDRA named current and former Commission members, Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas, together with Melinda Tucker, former attorney for the Commission, as defendants in a suit filed in U.S. District Court, Middle District of Louisiana captioned *Livingston Downs Racing Association, Inc. v. Jefferson Downs Corporation, et al.*, Civil Action No. 96-3430-C-M1. Among the allegations contained in the petition were conspiracy to violate anti-trust, restraint of trade and § 1983 Civil

Rights violations for illegal actions under color of state law.

Shortly thereafter, the Commission defendants approached LDRA to discuss a resolution of the issues. LDRA had no desire to harm individual members of the Commission. LDRA's only desire was to move forward with its efforts to build its race track project. LDRA only wanted the Commission to cease its interference, in conjunction with the Fair Grounds (who has admitted this collusion in pleadings filed with the federal court), with LDRA's efforts to build its race track project in violation of the racing statutes and LDRA's constitutionally protected rights to equal protection and due process. LDRA's reasoning was that if the Commission would not follow its mandate under the racing statutes to assist LDRA in its efforts, then it at least should not cause further interference and delays. With these objectives in mind, LDRA negotiated the consent judgment, and in return dismissed the Commission defendants from the federal lawsuit.

Had the parties not entered into a consent judgment, the issue of the license revocation would have proceeded to trial on the merits in Judge Giarrusso's court. The record and law clearly supports LDRA's position. Furthermore, the Commission would have faced an expensive trial in federal court, with significant exposure to personal monetary damages. LDRA negotiated the consent judgment in good faith. It is now apparent that the Commission members, on the other hand, secured a release to their benefit and simply waited for the appropriate time and opportunity to again work in conjunction with other federal defendants to keep LDRA from building its race track project. The Commission's actions which

are the subject of this writ are purely retaliatory to punish LDRA for daring to stand up for its rights.

On August 18, 1998 Terrence Lee Odom dismissed with prejudice his pending appeal in the matter entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish. This suit constituted a serious impediment to LDRA obtaining a financing commitment because this litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of live horse racing in Livingston Parish.

As soon as the dismissal was ordered, LDRA sent a written request to the Commission for an extension of the October 31, 1998 deadline contained in the consent judgment. On September 17, 1998 the Commission advised Mr. Jude Bursavich, counsel for LDRA, that the Commission was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further informed Mr. Bursavich that LDRA had not been placed on the agenda of the Commission's September 26, 1998 meeting. However, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline. A meeting notice was forwarded to Mr. Bursavich.

The Commission purportedly held the meeting on Saturday, September 26, 1998. On information and belief, the Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission

did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. This is in violation of the Administrative Procedure Act.

The Commission has failed to produce any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on LDRA's request for an extension. On September 23, 1998 Mr. Victor Sachse, III, counsel for LDRA, issued a letter to the attorney for the Commission and forwarded several documents to the Commission for its consideration at its September 26, 1998 meeting. LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered a commitment to the Commission office in New Orleans, Louisiana. LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said commitment. Instead, the Commission arbitrarily and capriciously rejected said commitment without even communicating with the lender or LDRA. The action of the Commission is in direct violation of the Administrative Procedure Act, is in bad faith, violates the spirit of the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974.

Then, on November 10, 1998 the Commission filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to Mr. Sachse which was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter timely. However, the Commission has not even acknowledged receipt of said commitment (other than date and time stamp by its Executive Director on October 30, 1998) or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." This communication was provided by Mr. Matthew E. McManus, Partner of RFG. The Commission simply, in bad faith, breached its agreement with LDRA and therefore, the case should be reinstated before the trial court.

On November 18, 1998 Claude F. Reynaud, Jr., counsel for LDRA filed a motion to continue the hearing on the defendant's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was advised that said clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for LDRA again contacted Judge Giarusso's office and was advised

by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and advise that LDRA would be allowed oral argument on the motion.

Although the motion to dismiss filed by the Commission was scheduled for contradictory hearing on December 4, 1998, a contradictory hearing did not take place. Despite the fact numerous exceptions were filed by LDRA, along with a petition for writ of mandamus and a motion to enforce section 16 of the consent judgment, the hearing lasted less than ten minutes. After a brief opening statement by counsel for the Commission, Judge Giarrusso recognized Mr. Victor Sachse, III, counsel for LDRA. Mr. Sachse noted that Mr. Paul Burgess, Executive Director of the Commission, and Ms. Kim Chatelain, counsel for the Commission, were present. Mr. Sachse requested that the Judge issue an instanter subpoena to these two parties in order to establish that there had been no official action taken by the Commission which authorized the filing of the subject motion to dismiss. Judge Giarrusso responded by advising Mr. Sachse that he could get them (the subpoenas) from the Fourth Circuit because she was granting the motion to dismiss. Judge Giarrusso advised Ms. Chatelain to draw up the order and that she would sign the order the same day. Gavel down, hearing over, order signed within hours.

The trial court's refusal to permit LDRA to participate in a proceeding in open court and to present its case constitutes denial of due process under both the U.S. and La. Constitutions. It also constitutes denial of LDRA's

right to free access to the courts under La. Const. Art. I, Section 22. LDRA attempted to introduce evidence to preserve the record to the trial court at the hearing of this matter and was not allowed to do so. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then the party's rights under Art. I Section 19 are violated.

In addition to the trial court's actions, LDRA filed three separate motions requesting that the Court of Appeal direct the Clerk of Court for the Parish of Orleans to complete the record on appeal, all of which are a part of the appellate record. The Court of Appeal twice ordered the appellate record supplemented. However, at noon on November 5, 1999, the last return date given to the Civil District Clerk to correctly and completely supplement the record, the record still did not contain even the pleadings related to the trial court's dismissal of this action. The same day, undersigned counsel filed its third motion requesting that the Court of Appeal direct the Civil District Clerk to complete the appellate record and also filed a motion to withhold submission of the case until the record was complete. At the oral argument before the Court of Appeal, the panel stated that it would address the matter of the incomplete record at a later date. Undersigned counsel never received any notification that the motions were acted upon.

Among the pleadings missing from the record herein are the following which are germane to the motion to

dismiss filed by the Commission which is the subject of the instant appeal:

a. Consent Judgment between the parties filed on November 15, 1996.

b. The Commission's motion to dismiss filed on November 10, 1998.

c. LDRA's motion to continue hearing on the Commission's motion to dismiss filed November 18, 1998.

d. The Commission's opposition to LDRA's motion to continue hearing filed November 23, 1998.

e. The trial court's November 30, 1998 order denying LDRA's motion to continue.

f. LDRA's opposition to the Commission's motion to dismiss filed on December 1, 1998.

g. LDRA's motion to enforce Paragraph 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

h. LDRA's memorandum in support of motion to enforce Paragraph 16 of Consent Judgment, set aside Consent Judgment, reinstate proceedings and discovery and to set trial date filed on December 3, 1998.

i. LDRA's dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

j. LDRA's memorandum in support of dilatory exception of prematurity and peremptory exception of no cause of action filed on December 3, 1998.

k. LDRA's petition for writ of mandamus filed on December 3, 1998.

l. The Commission's motion and incorporated memorandum to quash request for production of documents filed on December 4, 1998.

m. LDRA's petition for suspensive appeal filed on December 21, 1998.

n. LDRA's notice of intent to apply for writs filed on December 21, 1998.

o. Trial Court's December 21, 1998 order granting LDRA's suspensive appeal filed on December 21, 1998.

p. LDRA's motion to limit the record on appeal filed on January 20, 1999.

q. Court's notice of estimated appeal cost filed February 8, 1999.

The Civil District Clerk failed to even supplement the record with these seventeen documents which are required for the trial court, the appeal court and this Honorable Court to render a decision.

Moreover, the record of the April 29, 1994 Commission meeting which is the subject of this lawsuit, which the Commission supplemented with this Court, is still far from complete. The record does not contain all of the pleadings filed by LDRA with the Commission, nor does it contain LDRA's attempts to have witnesses subpoenaed or documentation of the Commission's blatant refusal to do so. LDRA even offered, in both its second and third motion to complete the record, to provide legible copies of all pleadings to either the trial court or to the appellate court, if necessary.

LDRA has made every attempt to have a complete record before this Court. Without a complete record, its constitutional rights under Article 1, Section 19 of the Louisiana Constitution are being violated.

ASSIGNMENTS OF ERROR

1. The trial court and the appellate court erred in addressing the settlement agreement between the parties which was not a part of the proceedings and therefore was not properly before the courts.

2. The trial court and the appellate court erred in failing to take cognizance of pertinent provisions of the consent judgment which control this appeal.

3. The appellate court erred in ruling that the issue of whether the Commission properly revoked LDRA's license was rendered moot by the consent judgment.

4. The trial court and the appellate court erred by failing to find that LDRA timely filed its application and commitment letter in accordance with Sections 4 and 6 of the consent judgment.

5. The trial court and the appellate court erred in finding that no action by the Commission was required regarding LDRA's application when action by the Commission was expressly provided for in the consent judgment.

6. The appellate court erred in affirming the trial court's granting of the Commission's motion to dismiss when the trial court did not properly conduct a contradictory hearing as required by the Louisiana Code of Civil Procedure.

7. The appellate court erred in failing to require the trial court to conduct a contradictory hearing on the exception of prematurity, motion and writ of mandamus filed by LDRA.

8. The appellate court erred in affirming the actions of the trial court when such actions clearly denied LDRA's constitutional right to due process, as well as its constitutional right to be secure in its property granted under both the state and federal constitutions.

9. The appellate court erred in affirming the trial court's decision in rendering a judgment in this matter when both the administrative record and the record on appeal were so grossly incomplete as to violate LDRA's right to due process under both the state and federal constitutions.

10. The appellate court erred in ruling on the merits of the original appeal as well as affirming the trial court's dismissal on December 4, 1998 when the record, if accurate and complete, clearly shows that the Commission failed to follow the racing statutes, Open Meetings Law and the Administrative Procedure Act and violated LDRA's right to due process, as well as its constitutional right to be secure in its property granted under both the state and federal constitutions.

11. The trial court and the appellate court erred in finding that LDRA did not properly disclose ownership at the time its application was submitted to the Commission.

12. The trial court and the appellate court erred in failing to find that the Commission violated both the spirit and the letter of the statutes enacted to set forth the legislative intent and the

procedures which the Commission must follow regarding licenses issued to racing associations.

13. The appellate court erred in affirming the trial court's granting the Commission's motion to dismiss when said motion was premature.

SUMMARY OF THE ARGUMENT

For the reasons set forth herein below, LDRA hereby applies for writ of certiorari or review with this Honorable Court from the decision rendered February 16, 2000 (***Appendix* 2**) and the denial of LDRA's application for rehearing on March 16, 2000 (***Appendix* 3**). The Court of Appeal's decision affirmed the trial court's judgment dismissing LDRA's suspensive appeal of the Commission's April 29, 1994 revocation of LDRA's licenses (***Appendix* 4**). The Court of Appeal's decision is based on incomplete facts and when all pertinent facts are considered, is factually and legally incorrect. LDRA respectfully urges that a careful examination by this Honorable Court is warranted.

On careful review of the Court of Appeal's February 16, 2000 opinion in this matter, it is clear that the material facts in support of the Court of Appeal's legal conclusions are incorrect. Moreover, the record was so far from complete that it placed the Court of Appeal at a distinct disadvantage in ascertaining all material facts relating to this matter. The state of the record is more fully addressed in Section VI, herein below.

ARGUMENT OF ASSIGNMENTS OF ERROR

MAY IT PLEASE THE COURT:

I. The settlement agreement between the parties was not properly before this Honorable Court.

Page 2 of the Court of Appeal's decision states "to avoid further litigation, the parties entered into a consent judgment and settlement agreement on November 15, 1996." The settlement agreement and the consent judgment dealt with totally separate and distinct issues. The settlement agreement encompassed the entirety of the agreements made between the parties regarding multiple litigation. The consent judgment executed between the parties on November 15, 1996 was but one issue of six different issues between the parties that are outlined in the settlement agreement executed on November 15, 1996. The only issue in the settlement agreement regarding the instant litigation is "the parties agree to obtain a consent decree in the matter entitled "Livingston Downs Racing Association, Inc. v. Louisiana State Racing Commission," No. 92-20961 c/w 95-15331, Civil District Court for the Parish of Orleans in the form annexed as *Appendix A*." The intent of the parties regarding the instant litigation is set forth in the consent judgment which is (or should be) a part of the record of this matter. The settlement agreement is not part of the record of this matter and is not indicative of the intent of the parties with respect to this litigation. Moreover, as the settlement agreement was not part of the record at the trial court, it should not have been a factor in the Court of Appeal's decision because it was not properly before the court.

II. Neither the trial court nor the Court of Appeal took cognizance of pertinent provisions of the consent judgment, which control this appeal; the issue of whether the Commission properly revoked LDRA's license was not rendered moot by the consent judgment.

The Court of Appeal stated on page 2 of its February 16, 2000 decision, "the specific paragraphs of the consent judgment pertinent to this appeal read as follows: . . . " Paragraphs 6, 7, 8, 9, 15, 16 and 18 are enumerated therein. Apparently, however, neither the trial court nor the Court of Appeal took cognizance of the significance of paragraphs 1, 2 and 4 which state:

> 1. IT IS ORDERED, ADJUDGED AND DECREED that the trial of this matter scheduled for February 3, 1997 be and it is hereby CONTINUED WITHOUT DATE.
>
> 2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings, including all discovery herein, be and they are hereby STAYED.
>
> 4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall consider an application to be filed by Livingston Downs Racing Association, Inc. for a ten (10) year license to operate a racetrack on the property situated in Livingston Parish, which property is more fully described in the applications previously filed by Livingston Downs Racing Association, Inc. with the Commission, and for racing dates for a period not exceeding three racing years, all pursuant to La. R.S. 4:158(B), on or before October 31, 1998.

The issue of whether the Commission properly revoked LDRA's license without cause was not rendered moot when the parties entered into the consent judgment. In fact, the consent judgment expressly states the opposite. Paragraphs 1 and 2 of the consent judgment clearly contemplate, the continuation of this litigation. Furthermore, the aforementioned paragraphs in the consent judgment clearly mandate action by the Commission upon timely receipt of LDRA's application. LDRA timely filed its application on October 30, 1998.

III. LDRA timely filed an application and commitment letter in accordance with Sections 4 and 6 of the consent judgment.

On Friday, October 30, 1998 at 9:35 a.m., LDRA hand delivered the following documents to the Commission office in New Orleans, Louisiana: 1) an application by Livingston Downs Racing Association, L.L.C. for a license; 2) a financial statement of Livingston Downs Racing Association, L.L.C.; 3) the balance sheet of Livingston Downs Racing Association, Inc.; and 4) a "Conditional Commitment for Collateralized Mortgage Financing" issued by Remington Financial Group, Inc. to applicant Al Ransome, Livingston Downs Racing Association, Inc. Copies of these documents were attached as Exhibit 1, *in globo*, to LDRA's opposition to the Commission's motion to dismiss, and therefore, are or should be a part of the record on appeal. Contrary to the Court of Appeal's findings of fact (page 4 of the Court's opinion), the Commission did not receive these documents via fax, but by hand delivery. Paul Burgess, Executive Director of the Commission at that time, attested to the receipt of

these documents by affixing his signature, along with the date and time of receipt to the face of said documents. The Court of Appeal erroneously states on page 7 of its opinion that it was November 12, 1998 when the Racing Commission finally received an original application and a copy of the conditional commitment with the signature page. As stated hereinabove, this is simply not true.

IV. Action by the Commission was expressly provided for in the consent judgment.

The Court of Appeal further stated on page 6 "once the consent judgment was confected, the Racing Commission could take no further action regarding Livingston Downs' license that was not expressly provided for in the consent judgment." However, the reverse is true. Once the application and commitment letter were filed by LDRA with the Commission, then the Commission was mandated by the consent judgment to perform the action provided for in the consent judgment, namely conduct an investigation of LDRA's funding sources and act upon the application. Paragraphs 4 and 15 expressly provide for action by the Commission. The manner in which the Commission is authorized to take action is dictated by LSA-R.S. 4:151, et seq. and LSA-R.S. 49:961, et seq. The Court of Appeal ruled on page 5 of its opinion that the Administrative Procedure Act applies to actions by the Commission. However, the Commission failed to act pursuant to the Administrative Procedure Act.

The Consent Judgment provided that LDRA would file an application on or before October 31, 1998. The application had to include an enforceable commitment

letter in the amount of ten million dollars. The Commission then had the ***duty*** to investigate the source of LDRA's funding. Upon completion of its investigation the Commission was required to promptly act upon the application. Or, as Paragraph 4 of the Consent Judgment states, "the Commission SHALL consider an application" [to be filed by LDRA]. (emphasis supplied).

The Court of Appeal's primary focus is whether LDRA complied with the terms of the consent judgment in the filing of its application. Among other things, the Court is basing its decision on semantics (i.e., the fact that the commitment has the word "conditional" in its title and the fact that the commitment does not use the magic words "in an amount not less than ten million ($10,000,000.00) Dollars"). This does not alter the fact that LDRA complied with the consent judgment and filed an application on or before October 31, 1998 together with a commitment letter in the amount of $10,000,000.00.

In *Birchard v. State Bd. of Medical Examiners*, 609 So.2d 980 (La. App. 4th Cir. 1992), Birchard appealed from the board's refusal to grant him permission to practice medicine at a certain hospital, without first giving him a hearing. The board had previously revoked Birchard's license but authorized him to "practice medicine only as an employee of a medical institution approved in advance by the board." The Fourth Circuit found that Birchard had not appealed the decision revoking his license or placing this condition on him. The court found that Birchard was appealing only from the procedure the board used to enforce its decision not to allow him to practice at a certain hospital. The court went on to state "there was nothing in the wording of the 'prior approval'

condition of probation to even remotely suggest to Dr. Birchard that he would be entitled to a hearing each time the Board exercised its approval process. He had no reason to expect anything other than the unilateral action of the Board in the enforcement of that condition of probation . . . "

In the present case once an application containing a ten million dollar commitment was filed with the Commission, it had no unilateral right to do anything other than conduct an investigation and convene an open meeting pursuant to the Administrative Procedure Act and LSA-R.S. 4:141, et seq. to issue a ruling on the LDRA application.

In *Ensenat v. Bd. of Medical Examiners,* 593 So.2d 929 (La. App. 4 Cir. 1992) Dr. Ensenat was brought before the board on various charges. At the hearing he entered into a consent order revoking his license to practice medicine and waiving his right to seek reinstatement for a period of five years. After five years he could seek reinstatement but reinstatement would depend solely upon the discretion of the board. When Dr. Ensenat sought unconditional reinstatement the board offered only conditional reinstatement Ensenat then filed suit to compel the board to reinstate his license to practice medicine or to afford him a full hearing on his application for reinstatement.

The Fourth Circuit found that the consent agreement did not give Ensenat the legal right to reinstatment. In regard to Ensenat's argument that due process required the board to grant him a hearing the court stated at page 933 that:

> Dr. Ensenat's possession of a medical license gives him a vested property interest, which guarantees him a right to due process prior to revocation of that license. However, by virtue of the 1976 consent order, that property interest was properly extinguished by due process of law, and Dr. Ensenat does not claim otherwise.

In the present case LDRA's possession of a license, even if suspended, gives it a vested property interest, which guarantees it a right to due process prior to being deprived of that license. The consent judgment expressly contemplates and expressly provides that a hearing be held by the Commission upon LDRA filing an application with a ten million dollar enforceable commitment by October 31, 1998. LDRA filed its application together with a signed ten million dollar enforceable commitment on October 30, 1998. Under the consent judgment, LSA-R.S. 4:158 and the Administrative Procedure Act, the ball was then in the Commission's court for it to conduct an investigation and hold a hearing. It did niether [sic].

R. S. 4:158 provides that "the Commission ***shall convene*** to consider the refusal or granting of the permits or licenses applied for." The procedure used by the Commission must afford an applicant a fair and proper opportunity to present the merits of the request and to have a determination made after the request is considered. A procedure devoid of staff reports and studies or sworn testimony, and no opportunity for interested parties to confront and cross examine violates due process and "is not at all consistent with the letter or the spirit of the administrative procedure act." *Jefferson Downs v. La. State Racing Com'n*, 288 So.2d 653, (La. App. 4 Cir. 1974).

In the present case the Commission never convened a hearing to consider the application, much less conduct a proper hearing.

The Court of Appeal stated on page 5 of its opinion that "once the consent judgment and settlement were approved and entered into in accordance with the Open Meetings Law and Administrative Procedure Act, the parties were bound by the provisions of the consent judgment, over which the trial court expressly retained jurisdiction." Yet, the Court further stated that "nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment." Incredibly, in the same opinion, the Court of Appeal also stated, on page 6, that "pursuant to paragraph 15, the Racing Commission could seek a dismissal of the suit if it determined the application and commitment letter were insufficient or untimely." This contemplates action by the ***full commission***. Furthermore, until the Commission issues an official ruling regarding the LDRA application any action filed pursuant to paragraph 15 of the consent judgment is premature.

It is well settled that a representative of a legal entity cannot act without special authorization. For example, the president of a corporation may not sue in the name of the corporation without special authorization from the board of directors to bring the suit. See *Pardee Co. v. H. Alfrey Heading Co.*, 129 La. 749, 56 So.2d 660 (La. 1912). In the present case there is no evidence in the record that the Commission gave special authorization to its legal counsel, either in the consent judgment or in an open meeting,

to proceed to act on the application. Absent such special authorization, the Commission's legal counsel had no authority to act on her own. Moreover, pursuant to Paragraph 18 of the Consent Judgment, the trial court retained jurisdiction ***only*** over the enforcement of the consent judgment. Paragraphs 4, 5, 7, 8, 9, 10, 11, 12, 16, and 17 ***clearly*** contemplate and mandate action by the Commission with respect to LDRA's application filed on October 30, 1998.

V. The trial court did not conduct a contradictory hearing, as contemplated by the Louisiana Code of Civil Procedure; LDRA was denied its constitutional right to due process under the state and federal constitutions as well as its constitutional right to he secure in its property without due process of law.

Although the motion to dismiss filed by the Commission was scheduled for contradictory hearing on, December 4, 1998, a contradictory hearing did not take place. LDRA refers this Court to its statement of facts hereinabove. Moreover, the trial court did not transcribe any portion of this so-called contradictory hearing. There was no contradictory hearing as found by the Court of Appeal on page 5 of its opinion. The refusal of a trial court to permit a party to participate in a proceeding in open court and to present that party's case constitutes denial of due process under both the U.S. and La. Constitutions. It also constitutes denial of that party's right to free access to the courts under La. Const. Art. I, Section 22. *Zarek vs. Sanders*, 656 So.2d 1038 (La. App. 5 Cir. 1994). Substantive due process is involved in claims in which action by a

state or local government interferes with property interests in an arbitrary or capricious manner. *Standards Materials, Inc. v. City of Slidell*, 96-0684 (La. App. 1 Cir. 9/23/97, 700 So.2d 975.

La. Const. Art. 1, Section 19 provides provides that "no person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based . . . " This provision is not limited to criminal convictions or forfeitures. See, *Walker v. Stewards of Jefferson Downs Race Track*, 615 So. 2d 403, (La. App. 4 Cir. 1993), and *Something Irish Co. V. Rack*, 333 So.2d 773, (La. App. 1 Cir. 1976).

LDRA attempted to introduce evidence to preserve the record to the trial court at the hearing of this matter and was not allowed to do so. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that right, then that party's rights under Art. 1 Section 19 are violated. *State v. Clark*, 93-0321 (La. App. 4 Cir. 10/27/94), 644 So.2d 1130, writ denied 94-2884 (La. 3/24/95), 651 So.2d 287.

La. Const. Art 1, Section 22 provides that "all courts shall be open and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." This provision is a mandate to the judiciary. *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986). See also *Zarek v. Sanders*, supra.

The Court of Appeal stated that if LDRA was aggrieved by the Commission's ruling or failure to act pursuant to Paragraph 16, it could seek judicial review by a summary proceeding or in a trial de novo or otherwise apply to the Court for appropriate relief. The Court of Appeal's own ruling contains conflicting opinions. In this section, the Court of Appeal refers to the "Racing Commission's ruling." In order for the Commission to rule, it had to conduct a meeting pursuant to the Open Meetings Law and the Administrative Procedure Act. This was not done. The Court of Appeal said that it was not necessary under the consent judgment. However, in another section of the Court of Appeal's opinion, the Court said the Administrative Procedure Act applied to the Commission. The Court of Appeal's ruling is contradictory.

LDRA could not seek judicial review by summary proceeding since the Commission failed to make an adjudication. The Commission never acted upon LDRA's application. LDRA filed a motion to enforce Paragraph 16 of the consent judgment. That motion, as well as all of the exceptions and a writ of mandamus filed by LDRA (see Section VI herein below), were never heard or considered in the trial court. A terse statement to the effect that "the motion of the Commission is granted and this suit is dismissed" without hearing evidence or oral argument from the parties is a clear violation, under the circumstances of the case, of La. Const. Art. 1, Section 22.

A recent decision of the First Circuit clearly addresses the requirement that the full record be available for review. In *Ford v. Louisiana Department of Public Safety and Corrections*, 96-2617 (La. App. 1st Cir. 12/28/99) 749 So.2d 910, the court stated:

[1] "Judicial review of a quasi judicial administrative agency action is said to be appellate review." *Johnson v. Department of Corrections*, 97-1891, p. 5 (La. App. 1st Cir. 6/25/99), 738 So.2d 1165, 1167. Therefore, when the district court reviewed this matter, it was sitting as an appellate court. Louisiana Code of Civil Procedure article 2161 states, in part, "[a]n appeal shall not be dismissed because the record is missing, incomplete or in error no matter who is responsible, and the court may remand the case either for retrial or for correction of the record."

Under the Louisiana Administrative Procedure Act, which has been held to be applicable to agency adjudication proceedings of the Department of Corrections, *Nix v. King*, 457 So.2d 805 (La. App. 1st Cir. 1984), the record in a case of adjudication must consist of the following:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered or a resume thereof if not transcribed;

(3) A statement of matters officially noticed except matters so obvious that statement of them would serve no useful purpose;

(4) Offers of proof, objections, and rulings thereon;

(5) Proposed findings and exceptions;

(6) Any decision, opinion, or report by the officer presiding at the hearing.

La.R.S. 49:955(E)

As indicated under subsection (2) of the foregoing list, the tape recording of the disciplinary hearings (or at a minimum, a resume of the evidence received at the hearing) constituted part of the record in this case. It would have been error on the part of the district court to have rendered a decision in absence of the evidence provided in the tape recordings.

In *Muggivan v. Jefferson Parish School Board*, 583 So.2d 1157 (La. App. 5th Cir.), *writ denied*, 590 So.2d 66 (La. 1991), the court set aside the judgment of the district court despite the fact that the transcript from the school board hearings lead not been included in the record before the district court. The appellate court found that the hearing before the school board took place over the course of three days, yet the stenographic notes from one of the days had been destroyed, could not be duplicated and therefore were not transcribed. The transcripts for the other two days were available but were not included in the record. The case was remanded with instructions to reconstruct and transcribe, if possible, those portions of the hearing that were destroyed. If this was not possible, then the court ordered that the plaintiff be granted a new trial before the school board.

The record shows that LDRA repeatedly requested that the full record be submitted to the appellate court. It is obvious that in absence of the full record, the courts below adopted the Commission's version of the events, which was either misleading or deliberately false.

On page 7 of its decision, the Court of Appeal *erroneously* ruled that the Commission received a faxed copy of the application and financing commitment, without a

signature page, and that the loan commitment was dated, signed by the borrower and lender and returned on or before November 10, 1998." The Court of Appeal further *erroneously* ruled that it was not until November 12, 1998 that the Commission finally received an original application and a copy of the conditional commitment with the signature page. The record clearly shows that the facsimile application and commitment letter were hand delivered to the Commission office and marked as received at 9:35 a.m. on October 30, 1998. A cover letter (stamped and received) explained that a facsimile of the original signature page, with signatures denoting acceptance by both borrower and lender, was attached and that the original documents would follow via Federal Express on Saturday, October 31, 1998 addressed to the Commission for Monday, November 2, 1998 delivery. The Commission office was closed on Saturday, October 31, 1998. The record will show that the original documents were deposited with Federal Express on Saturday, October 31, 1998 and were received by the Commission on Monday, November 2, 1998. In accordance with LSA-C.C.P. art. 5059, the application was timely filed.

The Court of Appeal further *erroneously* ruled that the Commission followed the Administrative Procedure Act in revoking LDRA's license on April 29, 1994. Even a mere cursory review of the transcript of the April 29, 1994 hearing clearly reveals that the Commission violated the Administrative Procedure Act. Moreover, as noted in LDRA's third motion for the Court of Appeal to direct the Commission to complete the administrative record numerous documents are still not in the record of the

Court of Appeal. A copy of LDRA's third motion is attached hereto as Appendix 4.

The Court of Appeal further *erroneously* ruled that the so-called evidentiary hearing held before the district court satisfied LDRA's due process rights of notice and opportunity to be heard. The record (or absence of record) shows that the hearing lasted less than five minutes and that LDRA was not allowed to present any witnesses, evidence or argument before the motion was granted.

VI. The record on appeal was incomplete; therefore, this Court could not rule on the merits of either the original appeal of the April 29, 1994 license revocation or the appeal from the trial court's dismissal.

LDRA filed three separate motions to order the Clerk of Court for the Parish of Orleans to complete the record on appeal, all of which are a part of the appellate record. The Court of Appeal ordered the appellate record supplemented twice. However, at noon on November 5, 1999, the last return date given to the Civil District Clerk to correctly and completely supplement the record, the record still did not contain even the pleadings related to the trial court's dismissal of this action. The same day, undersigned counsel filed its third motion to order the Civil District Clerk to complete the appellate record and a motion to withhold submission of the case until the record was complete. At the oral argument before the Court of Appeal, the panel stated that it would address

the matter of the incomplete record at a later date. Undersigned counsel never received any notification that the motions were acted upon.

Among the pleadings missing from the record herein are those listed in the statement of facts hereinabove which are germane to the motion to dismiss filed by the Commission which is the subject of the instant appeal. The Civil District Clerk failed to even supplement the record with those seventeen documents which were required for the Court of Appeal to render its decision without violating LDRA's due process rights.

Moreover, the record of the April 29, 1994 Commission meeting which is the subject of this lawsuit, which the Commission supplemented with this Court, is still far from complete. The record does not contain all of the pleadings filed by LDRA with the Commission, nor does it contain records relating to LDRA's attempts to have witnesses subpoenaed or documentation of the Commission's blatant refusal to do so.

LDRA offered, in both its second and third motion to complete the record, to provide legible copies of all pleadings to either the trial court or to the appellate if necessary.

LDRA has made every attempt to have a complete record before this Court. Without a complete record, its constitutional rights under Article 1, Section 19 of the Louisiana Constitution are being violated. Although an incomplete record will not necessarily be a violation of Art. 1, Sect. 19, the jurisprudence is clear that where a party's right of review is prejudiced, not by his own act or omission, but by the failure of a court to protect that

right; then that party's rights under Art. 1 Section 19 are violated. *State v. Clark,* supra.

VIII. Ownership in LDRA was properly disclosed at the time the application was submitted.

LDRA complied with the provisions of LSA-R.S. 4:147(4) by properly stating the ownership at the time the application was filed. The commitment provided that at a *later* date LDRA may transfer an ownership interest to parties selected by Remington, at its sole discretion. This clause legally bound only LDRA and Remington. Parties cannot, by contract, supersede slate law. Both Remington and LDRA were aware that they must submit any ownership changes to the Commission for its approval. The Commission still had the power and authority to reject, for just cause, any party submitted by Remington. The Commission had the power to deny Remington's participation until such time as it submitted nominees acceptable to the Commission.

The Court of Appeal, on page 4 of its opinion, addresses the Commission's objections to the application filed in the name of LDRA, LLC. The application was filed by Livingston Downs Racing Association in the name of its **wholly owned subsidiary** to satisfy a condition of the financing agreement. There had been no change in any of the parties to the original LDRA application. It was well within the Commission's discretion to approve the modified application, as it has done for other racing associations prior to and subsequent to LDRA's submission of its application. Had LDRA been allowed to

introduce evidence at the December 4, 1998, the Commission transcripts in which the Commission allowed Louisiana Downs and Evangeline Downs to deviate from its application, would be in the record. LDRA was not allowed to do so. Moreover, had the Commission conducted a hearing as it was mandated to do under R.S. 4:158(B) and the consent judgment, this evidence could and would have been introduced before the Commission. LDRA was not allowed to do either, in violation of its state and federal constitutional rights.

IX. Both the trial court and the Court of Appeal erred in finding that the Commission's actions (or inactions) were not properly before the Court.

The statutes applicable to the facts of this case were not even considered or referenced by the Court of Appeal. The powers and duties of the Commission are specified in part in LSA-R.S. 1:144 which states in pertinent part:

> **§144. State Racing Commission, creation; membership; powers and duties; quorum; qualifications of members; per diem; expenses or disbursement; bond**
>
> A. There is hereby created in the executive branch of state government a racing commission to be known as "Louisiana State Racing Commission." The Commission shall have the powers and duties specified in the past and all other power necessary and proper to enable it to execute fully and effectually all of the objects, purposes, duties and policies of this part. . . . The governor shall select one member of the

commission to serve as chairman . . . *A majority of the members shall constitute a quorum for the transaction of any business or the exercise of any powers.* (Emphasis here and elsewhere unless otherwise stated is ours.)

The powers and duties of the Commission's attorney are clearly defined in LSA-R.S. 4:146 which states in pertinent part:

§146. Attorney for the commission.

A. The attorney general shall designate one of his assistants to act as attorney for the commission, without additional salary, who shall counsel and advise the commission, shall represent it in all legal proceedings, and shall prosecute any violation of the provisions of this part.

LSA-R.S. 4:154 provides that the Commission's hearing practice, procedures and rule making procedures are as provided in the Administrative Procedure Act. There are no provisions in the racing statutes that exempt the Commission from LSA-R.S. 42:4 through 42:13, the Open Meetings Law.

The legislative intent and policy is found in LSA-R.S. 4:141 which states in pertinent part:

§141. Legislative intent and policy.

1. To institute and maintain a program to encourage and permit development of the business of horse racing with pari-mutuel wagering thereon on a high plane.

2. To institute and maintain a program to encourage and permit development of the

breeding and ownership of race horses in the state.

4. To institute and maintain a program to provide financial assistance that will encourage and permit the development of the business of horse racing by licensed horse racing tracks in the state of Louisiana.

LSA-R.S. 4:142 states that the purpose of this chapter is to effectuate the policies set forth in LSA-R.S. 4:141.

LDRA respectfully submits that the actions of the Commission in the instant case violated both the spirit and the letter of the statutes outlined hereinabove.

This Honorable Court recently addressed the issue of legislative intent and actions of an administrative agency in *Jurisich v. Jenkins*, 749 So.2d 597 (La. 1999). The Court states in part:

> [6] While a persuasive indication of the true meaning of a statute is the contemporaneous administrative construction given the statute by an agency charged with administering it, an administrative construction cannot be given effect where it is contrary to or inconsistent with legislative intent. *Sales Tax Dist. No. 1 of LaFourche Parish v. Express Boat Company, 500 So.2d 362 (La. 1987).* An administrative construction cannot have weight where it is contrary to or inconsistent with the statute. *Traigle v. PPG Industries, Inc., 332 So.2d 777, 782 (La. 1976).*
>
> [7] . . . LSA-R.S. 56:425(C) recognizes that the Secretary may "make such stipulations in leases made by him **as he deems necessary and proper** to develop the [oyster] industry" provided that

the clauses are consistent with the statutory provisions of Subpart D.

While the facts of *Jurisich* and this case are not identical, this Honorable Court clearly states that an administrative body's actions must be in furtherance of the legislative intent of the statutes.

The Court of Appeal stated in its decision on page 5 that "nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment." However, such a clause was unnecessary because both the provisions of the consent judgment and operation of the laws outlined herein ***required*** the Commission to meet and discuss the issues. Furthermore, even if the consent judgment stated that it was not necessary for the Commission to hold an open meeting, which is emphatically denied, the terms of a consent judgment cannot override state law. Any such provision would be invalid.

The consent judgment clearly anticipated that both LDRA and the Commission would take certain actions. The record is clear that LDRA complied with the terms of paragraph 6 of the consent judgment by timely filing an application on its own behalf, although in the name of its wholly owned subsidiary, Livingston Downs Racing Association, L.L.C. The application clearly stated that the sole owner of the limited liability company was LDRA (Inc.). Once that application was filed, the Commission had to determine in an open meeting whether that application was acceptable. While the Commission's attorney

may have advised the Commission that LDRA had not met the requirements of the consent judgment, **only the full Commission,** not its chairman, nor any committee, nor its attorney could make a determination regarding an application for racing dates.

It not only was within the power of the Commission to accept this application, but to allow such a technicality to prevent the construction of a race track which would provide thousands of jobs and generate millions of revenue for state and local governments would be a direct abrogation of the mandate of the legislature as expressed in LSA-R.S. 4:141.

When viewed in the standards of *Jurisich,* supra, the Commission should have worked with LDRA to resolve any technical differences in the application and to resolve any problems it may have had with the loan commitment. Instead, the Commission did not even meet to discuss the issue. The arguments of the Commission in its motion to dismiss reflect only the opinion of its counsel. In filing the motion to dismiss, counsel not only exceeded her authority, but acted without any authority whatsoever within the Louisiana Revised Statutes. For this Court to rule otherwise would set a dangerous precedent. The attorney for the Commission cannot substitute her judgment for that of the Commission. The record is clear that the Commission did not meet to consider the application and financing commitment submitted by LDRA. (To this date, the Commission has not acted on the application nor has it returned LDRA's $5,000.00 application deposit.) The Commission did not rule on LDRA's application. The full Commission did not authorize the filing of the motion to dismiss, therefore, the motion was improperly

before the court. Even if it had, the motion is premature until the Commission acts in open meeting upon LDRA's application. Moreover, once LDRA filed its application and commitment letter, paragraph 15 was no longer applicable, therefore, the Commission did not have the right to file the motion to dismiss. The Commission was then bound to take action in accordance with paragraphs 7, 8 and 9 of the consent judgment. Since the Commission failed to take any of the official actions prescribed by law, the Commission violated the consent judgment and paragraph 16 of the consent judgment is controlling.

CONCLUSION

The Court of Appeal's ruling contains conflicting opinions regarding the Commission's jurisdiction to grant or deny the license application filed by LDRA. Moreover, the ruling contains conflicting legal conclusions based on erroneous and/or incomplete facts. For the foregoing reasons, LDRA respectfully applies for writs of certiorari or review with this Honorable Court from the decision rendered February 16, 2000 and subsequent denial of LDRA's application for rehearing on March 16, 2000 in the above entitled and numbered cause.

This case involves substantial legal issues which seriously impact not only LDRA and the Louisiana racing industry, but also all state administrative agencies. The erroneous ruling of the Fourth Circuit Court of Appeal sets a dangerous precedent for denying rights of individual which are protected under both the state and federal constitutions. It is absolutely necessary that the courts have a full and complete record upon which to base

decisions. The interests of justice dictates that the decision of the Fourth Circuit Court of Appeal be reversed. LDRA respectfully requests that this Honorable Court void the consent judgment based upon the Commission's failure to comply with its provisions and remand this case to the trial court in order that discovery can be completed and a trial on the merits conducted on LDRA's suspensive appeal of the April 29, 1994 license revocation by the Commission. In the alternative, and only in the alternative, this case should be remanded to the Commission in order that it may take action on LDRA's October 30, 1998 application in accordance with the racing statutes, the Open Meetings Law and the Administrative Procedure Act.

Respectfully submitted:

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AND
J. Marvin Montgomery
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VERIFICATION

BEFORE ME, the undersigned Notary Public, in and for the Parish of East Baton Rouge, personally came and appeared:

Darlene S. Ransome

who, after being duly sworn did depose and state:

Along with co-counsel, Breazeale, Sachse & Wilson, L.L.P. and J. Marvin Montgomery, she has prepared the foregoing Writ Application and that the allegations of the Writ Application are true to the best of her knowledge, information and belief.

She does hereby certify that the Fourth Circuit Court of Appeal, Honorable Robin A. Giarrusso, District Court Judge, and opposing counsel, Kim R. Chatelain, have this day been sent a copy of this Writ Application by U. S. mail, postage prepaid and properly addressed.

/s/ Darlene S. Ransome
Darlene S. Ransome

Thus sworn and subscribed before me, Notary Public on the 14th day of April, 2000.

/s/ Catheryn Clainsee-Kojis
Notary Public

Exhibit Appendix 1

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

SECTION 11

DIVISION "G"

NOS. 92-20961 c/w
95-15331

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

CONSENT JUDGMENT

(Filed Nov. 15, 1996)

This matter came before the Court on the consent of the parties.

Considering the law and the evidence, the stipulations and consent of the parties, and the arguments of their counsel, the court determining that this judgment should issue on the consent of the parties as evidenced by their signatures hereon,

1. IT IS ORDERED, ADJUDGED AND DECREED that the trial of this matter scheduled for February 3, 1997 be and it is hereby CONTINUED WITHOUT DATE.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings, including all discovery herein, be and they are hereby STAYED.

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during the pendency of the Stay of these proceedings the ten year license issued to Livingston Downs Racing Association, Inc. on May 27, 1993 and licenses to conduct live race meetings previously issued to Livingston Downs Racing Association, Then by the Louisiana State Racing Commission are suspended, and the Commission shall not, except as hereinafter provided in this Consent Judgment, be required to consider the plaintiff as a licensed association. The parties acknowledge the finality of the judgment of the court of Appeal – Fourth Circuit in proceedings **Jefferson Downs v State Racing Commission**, #94-2235, 637 So2d 1279 (La. App. 4 Cir. 1994) regarding the permit issued to the plaintiff pursuant to La. R.S. 4:181 on December 10, 1992.

4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall consider an application to be filed by Livingston Downs Racing Association, Inc. for a ten (10) year license to operate a racetrack on the property situated in Livingston Parish, which property is more fully described in the applications previously filed by Livingston Downs Racing Association, Inc. with the Commission, and for racing dates for a period not exceeding three racing years, all pursuant to La. R.S. 4:158(B), on or before October 31, 1998.

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any dates for which Livingston Downs Racing Association, Inc. may apply to conduct a live race meeting shall be restricted as follows: (1) for thoroughbred racing; for the period after the traditional close of the Evangeline Downs live race meeting until the traditional opening of the Fair Grounds live race meeting, and

(2) for quarterhorse racing: for the period of November through April. Provided however, nothing contained herein shall prevent the Commission from awarding to Livingston Downs Racing Association, Inc. other racing dates which may become available if such dates are requested by Livingston Downs Racing Association, Inc.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4) (a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act

upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

10. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the ten year license to be issued shall include simulcasting rights as conferred upon other licenses associations pursuant to La. R.S. 4:149.2, which rights may only be exercised by the licensee so long as it conducts live horse racing for not less than eighty racing days within a twenty consecutive week period at the facility designated in its license. The § 149.2 simulcasting rights currently enjoyed by licensed associations under current rules, regulations, policies and practices of the Commission include year-round simulcasting of out-of-state races at the racing facilities of the licensees.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the ten year license to be issued shall not include simulcasting rights as conferred upon other licensed associations pursuant to La. R.S. 4:211 et seq., including but not limited to § 214(D). However, this

Consent Judgment would not prohibit Livingston Downs Racing Association, Inc. from applying for licensing under §§ 211 et seq. in the event of a final decision of the Louisiana Supreme Court favorable to it in the matter on appeal to that court from the 19th Judicial District Court for the Parish of East Baton Rouge in proceedings numbered 399,563 entitled **Livingston Downs Racing Association, Inc. v The State of Louisiana (Edwards), et al.**

12. IT IS FURTHERED ORDERED, ADJUDGED AND DECREED that, within the delays indicated below from the date of the issuance of its ten year license by the Commission, Livingston Downs Racing Association, Inc. shall make substantial progress toward the completion of the following matters by the times set forth, and failure to make substantial progress by such times may constitute "just cause" for the suspension or withdrawal of the license by the Commission.

(a) sixty (6) days: submission of an up-to-date business plan to the Commission.

(b) eighteen (18) months: submission of final architectural and engineering plans for the racing facility, bid specifications, and building permits, and environmental and wetlands clearances to the Commission.

(c) two (2) years: awarding of the construction contract for the racing facility and filing construction contract with the Commission.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, within four (4) years from the date of the issuance of its ten year license by the Commission, or by August 31, 2003, whichever is later, Livingston Downs

Racing Association, Inc. shall file with the Commission (1) a true copy of the affidavit of substantial completion and acceptance of the property by the owner, (2) its first condition book as provided for in Rules of Racing 35:III.5729, and (3) its list of employees and officials as provided for in Rules of Racing 35:III.5701, and failure to do so by such time may constitute "just cause" for the suspension or withdrawal [sic] the license by the Commission.

14. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event of delays in construction, which are caused by labor strikes, material shortages, acts of God or of war, then the Court may grant reasonable extensions of the times established in the preceeding numbers 12 and 13, if the parties have been unable to agree upon such extensions.

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event that Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinabove, then these proceedings shall be dismissed with prejudice at plaintiff's cost.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs

Racing Association, Inc. may after October 31, 1998 obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

17. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commission shall afford Livingston Downs Racing Association, Inc. on or about April 15th and on or about August 15th of 1997 and 1998 notice of any requests for racing dates which may conflict with those to be sought by Livingston Downs Racing Association, Inc. and shall consider any objections which plaintiff may have to the granting of such dates to any other association.

18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

JUDGMENT READ, RENDERED AND SIGNED this 15 day of November, 1996 at New Orleans, Louisiana.

/s/ (Sgd.) Robin M. Giarrusso
JUDGE

Consented to and submitted by:

FOR THE PLAINTIFF, LIVINGSTON DOWNS RACING ASSOCIATION, INC.
By: /s/ Al J. Ransome
Al J. Ransome, President
By: /s/ Darlene S. Ransome
Darlene S. Ransome, Esq.
LSBA # 21983
Counsel

By: /s/ Victor A. Sachse, III
Victor A. Sachse, III, Esq.
LSBA # 11645
Counsel

FOR THE DEFENDANT, LOUISIANA STATE RACING COMMISSION
By: /s/ Albert M. Stall
Albert M. Stall, Chairman
By: /s/ Paul A. Bonin
Paul A. Bonin
Assistant Attorney General
LSBA # 3211
Counsel

EXHIBIT

Appendix 2

JEFFERSON DOWNS CORPORATION, INC. ET AL.	*	**NO. 99-CA-1001**
	*	**C/W**
VERSUS	*	**NO. 99-CA-1002**
	*	
LOUISIANA STATE RACING COMMISSION	*	**COURT OF APPEAL FOURTH CIRCUIT STATE OF LOUISIANA**
	*	
CONSOLIDATED WITH	*	
LIVINGSTON DOWNS RACING ASSOCIATION	*	
	*	
VERSUS	*	
	*	
LOUISIANA STATE RACING COMMISSION	*	

* * *

APPEAL FROM
CIVIL DISTRICT COURT, PARISH OF ORLEANS
NOS. 92-20961 C/W 95-15331, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE

* * *

MOON LANDRIEU
JUDGE

* * *

(Court composed of Judge Charles R. Jones, Judge Moon Landrieu, Judge Dennis R. Bagneris, Sr.)

RICHARD P. IEYOUB
ATTORNEY GENERAL – STATE OF LOUISIANA
KIM RAINES CHATELAIN
ASSISTANT ATTORNEY GENERAL –
STATE OF LOUISIANA
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AND
VICTOR A. SACHSE, III
CLAUDE F. REYNAUD
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AND
J. MARVIN MONTGOMERY
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BATON ROUGE, LOUISIANA 70896
COUNSEL FOR PLAINTIFF/APPELLANT

AFFIRMED

Livingston Downs Racing Association, Inc. ("Livingston Downs") appeals from a trial court judgment dismissing its suit against the Louisiana State Racing Commission ("Racing Commission"). The trial judge dismissed the suit, finding Livingston Downs failed to comply with the terms of a consent judgment that the parties had entered into on November 15, 1996. We affirm the judgment of the trial court.

At its meeting held on April 29, 1994, the Racing Commission revoked Livingston Downs' ten-year license to conduct race meets. Livingston Downs filed a petition for judicial review of the Racing Commission's action in the Twenty-First Judicial District Court for the Parish of Livingston. By judgment of the Louisiana Supreme Court the matter was transferred to Civil District Court for the Parish of Orleans pursuant to La. R.S. 4:145.1. The case was then consolidated with a related matter, *Jefferson Downs, et al. v. Louisiana State Racing Commission*, No. 92-20961, Division G, Orleans Parish Civil District Court. After the trial court dismissed the suit as untimely, Livingston Downs petitioned Civil District Court for a suspensive appeal. The trial court denied the suspensive appeal but granted a devolutive appeal. Livingston Downs subsequently filed a writ application to this Court. We granted the writ application and remanded the matter for the granting of a suspensive appeal in *Livingston Downs Racing Association, Inc. v. Louisiana State Racing Commission*, 96-1215 (La. App. 4 Cir. 6/5/96), 675 So. 2d 1214, *writ denied*, 9601750 (La. 9/3/96), 678 So. 2d 558.

To avoid further litigation, the parties entered into a consent judgment and settlement agreement on November 15, 1996. The consent judgment suspended Livingston Downs' license for two years and further provided that within two years Livingston Downs had to submit a new application which included a binding, enforceable commitment letter(s) in an amount not less than ten million dollars ($10,000,000.00) for the construction of a racing facility, oval and backside or the case would be dismissed. The specific paragraphs of the consent judgment pertinent to this appeal read as follows:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and 4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.
>
> 7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc., other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event Livingston Downs Racing Association, Inc. fails to file an application with binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the finding of the construction of the racing facility, including a grandstand, a racing oval and backside, on the timetable as set forth hereinabove, then these proceedings shall be dismissed with prejudice at plaintiff's cost.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year

license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

By terms of the settlement agreement, Livingston Downs and the Racing Commission settled other litigation affecting both parties and individual past members of the Racing Commission. Both the consent judgment and settlement agreement were approved at an open meeting pursuant to Louisiana's Open Meeting Law, La. R.S. 42:4.1 *et seq.*, which was conducted in accordance with the Administrative Procedure Act, La. R.S. 49:950. *et seq.*

As the deadline approached, Livingston Downs sent a letter to the Racing Commission requesting a one-year extension. The Commission considered the request at an executive session convened in an open meeting on September 26, 1998, and, shortly thereafter, responded to the request by letter stating that it was committed to abide by the terms of the consent judgment as entered into by the parties.

On October 30, 1998, the Commission received via fax the following documents: 1) an application by Livingston Downs Racing Association, L.L.C. for a license; 2)

a financial statement of Livingston Downs Racing Association, L.L.C; 3) the balance sheet of Livingston Downs Racing Association, Inc.; and 4) a "Conditional Commitment for collaterlized Mortgage Financing" by Remington Financial Group, Inc. to applicant Al Ransome, Livingston Downs Racing Association, Inc.

On November 10, 1998, the Racing Commission filed a motion to dismiss Livingston Downs' suit, arguing that Livingston Downs failed to satisfy the terms and conditions of the consent judgment. Specifically, it argued that the Conditional commitment for collaterlized Mortgage Financing was not a binding, enforceable commitment in an amount not less than ten million dollars. It also argued that contrary to La. R.S. 4:147(4) the conditional commitment allowed for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group. The Racing Commission also objected to the application because it was in the name of Livingston Downs Racing Association, L.L.C. rather than Livingston Downs Racing Association, Inc., the named plaintiff in the suit and consent judgment.

After a contradictory hearing the trial judge dismissed Livingston Downs' suit with prejudice at its cost pursuant to the November 15, 1996 consent judgment.

On appeal, Livingston Downs argues the trial court erred in dismissing its suit for two reasons. First, it contends the Racing Commission failed to take official action to authorize the filing of the motion to dismiss in violation of the Open Meeting Law. Second, it contends the Commission failed to follow the procedures set forth under the Administrative Procedure Act relevant to the

revocation of a license and the conduct of adjudicatory proceedings. The Racing Commission, on the other hand, argues the only issue on appeal is whether the trial court was correct in finding Livingston Downs had not complied with the consent judgment.

Livingston Downs is correct that the Administrative Procedure Act and Open Meeting Law apply to actions taken by the Racing Commission. The record indicates that the Racing Commission complied with these statutes when it initially revoked Livingston Downs' ten-year license at an open meeting on April 29, 1994 in Bossier City and when it later approved the consent judgment and concurrent settlement agreement on November 15, 1996. Once the consent judgment and settlement were approved and entered into in accordance with the Open Meeting Law and Administrative Procedure Act, the parties were bound by the provision of the consent judgment, over which the trial court expressly retained jurisdiction. Nowhere in the consent judgment does it provide the Racing Commission had to convene in an open meeting to authorize the filing of the motion to dismiss Livingston Downs' suit for failure to comply with the terms of the consent judgment.

Livingston Downs' argument that the granting of the Racing Commission's motion to dismiss was an improper adjudication of its license is without merit. The Racing Commission initially adjudicated Livingston Downs' license on April 29, 1994 when it revoked the ten-year license for failure to fulfill the purpose of which the license was granted. The issue of whether the Racing Commission revoked the license without cause, as Livingston Downs' argued in its suit, was rendered moot

when the parties entered into the consent judgment and the Racing Commission agreed to suspend the license for two years to allow Livingston Downs to rehabilitate itself. Once the consent judgment was confected, the Racing Commission could take no further action regarding Livingston Downs' license that was not expressly provided for in the consent judgment.

By its terms, the consent judgment anticipated three possible conclusions to the litigation: 1) Livingston Downs timely filed the application including the binding, enforceable commitment letter and the Racing Commission approved the application; 2) Livingston Downs failed to file a timely application including a binding, enforceable commitment letter; and, 3) Livingston Downs timely filed an application with the binding, enforceable commitment letter but the Racing Commission failed to approve or act upon it. In any of these events, the consent judgment clearly provided for a remedy in the district court. Pursuant to paragraph 15, the Racing Commission could seek a dismissal of the suit if it determined the application and commitment letter were insufficient or untimely. If Livingston Downs' was aggrieved by the Racing Commission's ruling or failure to act, pursuant to paragraph 16 it could seek judicial review by a summary proceeding or in a trial de novo or otherwise apply to the court for appropriate relief.

The issue before the district court at the hearing on the motion to dismiss was whether Livingston Downs timely filed an application and commitment letter in accordance with the terms of the consent judgment. Whether the trial court considered the issue on the motion to dismiss by the Racing Commission or on a

petition by Livingston Downs, it is clear from the record the court considered the issue in a contradictory hearing. In view of this, Livingston Downs cannot argue its license was adjudicated without notice and the opportunity to be heard.

We now address whether the trial judge erred in finding Livingston Downs failed to comply with the terms of the consent judgment.

Under the terms of the consent judgment Livingston Downs had to timely file an application including a "binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and backside, on the timetable as set forth hereinafter." Nonetheless, the faxed application included a document titled "Conditional Commitment for Collaterlized Mortgage Financing" by Remington Financial Group, Inc. This document expressly provided that the loan commitment was not valid unless a copy of the commitment was dated, signed by the borrower and lender and returned on or before November 10, 1998. The application and documents received by the Racing Commission never included a signature page for the conditional commitment. In fact, it was November 12, 1998 when the Racing Commission finally received an original application and a copy of the conditional commitment with the signature page.

We note that the conditional commitment submitted by Livingston Downs provided for financing in the "maximum amount of ($10,000,000.00)" rather than in "an amount not less than" ten million dollars as required by

the consent judgment. Also, the conditional commitment provided for ownership in the "project" by unknown persons at the sole and absolute discretion of Remington Financial Group, Inc." This provision conflicts with La. R.S. 4:147(4), which requires a corporate applicant seeking a license to operate race meets to fully disclose the names of the stockholders and directors of the corporation.

After reviewing the record in this case, we cannot say the trial judge's finding that Livingston Downs' application including the Conditional Commitment for Collaterlized Mortgage Financing did not satisfy the terms of the November 15, 1996 consent judgment was clearly wrong.

Accordingly, the judgment of the trial court rendered on December 4, 1998, granting the Racing Commission's motion to dismiss Livingston Downs' suit against it is affirmed. Our decision herein does not preclude Livingston Downs from reapplying for a license to operate race meets in the future.

AFFIRMED

EXHIBIT

Appendix 3

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, March 16 2000

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

JEFFERSON DOWNS CORP., ET AL V LOUISIANA STATE RACING COMM. no. 99-CA-1001 C/W 99-CA-1002

Very Truly yours,
DANIELLE A. SCHOTT
CLERK OF COURT

/s/ Calendered VE

EXHIBIT

Appendix 4

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NOS. 92-20961 c/w
95-15331

DIVISION "G" DOCKET:
SECTION "11"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

JUDGEMENT

The above captioned proceeding came for hearing on the merits of defendant, LOUISIANA STATE RACING COMMISSION, Motion To Dismiss on Friday, December 4, 1998:

PRESENT: KIM RAINES CHATELAIN,
Attorney for defendant,
Louisiana State
Racing Commission
VICTOR A. SACHSE, III
Attorney for plaintiff,
Livingston Downs
Racing Association, Inc.

DARLENE S. RANSOME
Attorney for plaintiff,
Livingston Downs
Racing Association, Inc.

After considering the law, the evidence, and for the reasons orally assigned

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Louisiana State Racing Commission, dismissing the above captioned suit by plaintiff, Livingston Downs Racing Association, Inc. against defendant, Louisiana State Racing Commission, with prejudice at plaintiff's cost pursuant to the Consent Judgment entered November 15, 1996.

JUDGMENT READ, RENDERED AND SIGNED this 4 day of December, 1998.

/s/ (Sgd.) Robin M. Giarrusso
JUDGE
[SEAL]

APPENDIX F

[Exhibits Omitted In Printing Except Exhibit 4]

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

NO. 2000-C-1067

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

VERSUS

STATE OF LOUISIANA, ET AL

ON WRIT APPLICATION BY LIVINGSTON DOWNS RACING ASSOCIATION, INC. FROM FOURTH CIRCUIT COURT OF APPEAL, NO. 99-CA-1001 CONSOLIDATED WITH NO. 99-CA-1002

AFFIRMING JUDGMENT

RENDERED BY JUDGE ROBIN A. GIARRUSSO, CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 95-15331 CONSOLIDATED WITH NO. 92-20961 CONSOLIDATED WITH 97-12435

OPPOSITION TO WRIT APPLICATION

(Filed May 1, 2000)

RICHARD P. IEYOUB
Attorney General

By:
KIM RAINES CHATELAIN
LSBA #21525
Assistant Attorney General

320 N. Carrollton Avenue,
Suite 2-Bt
New Orleans, Louisiana 70119
Telephone (504) 483-4000
Telefax (504) 483-4898
Attorney for State of Louisiana,
Racing Commission

MAY IT PLEASE THE COURT:

Respondent, State of Louisiana through the Louisiana State Racing Commission, submits the following opposition to relator, Livingston Downs Racing Association, Inc, application to this court to exercise its supervisory jurisdiction.

Livingston Downs has made an enterprise over the past five years of suing the Racing Commission, and from time to time, its individual commissioners.

The Supreme Court may recall that the parties were last before it regarding the constitutionality of La.Rev.Stat. 4:211 and off-track wagering rights in the matter **Livingston Downs Racing Ass'n, Inc v. State of Louisiana, et al.** No. 96-CA-2890, 705 So.2d 149 (La. 1997) The Court upheld the statute which precluded Livingston Downs from obtaining an off-track wagering license. Nevertheless, Livingston Downs persisted in suing the Racing Commission for off-track wagering rights.[1]

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[1] **Livingston Downs Racing Ass'n v. La. State Racing Comm'n.** No. 97-12435, Div "K" c/w No. 95-15331 "J" c/w No. 92-20961 "G", Civil District Court, Orleans Parish, Louisiana; 4th Circuit Court of Appeal No. 98-CA-1229 (affirming trial court judgment to dismiss suit).

With each suit, appeal, and writ application Livingston Downs reiterates and regurgitates *ad nauseam* the same misstatement or half-statement of facts, relevancy notwithstanding. The present writ application is without distinction. Essentially, Livingston Downs presents again the same argument presented to the Fourth Circuit Court of Appeal which was the same argument presented to the trial court. The only distinction to be drawn is the degree of factual embellishment and sweeping criticisms:

> the Court of Appeal's decision has so far departed from proper judicial proceedings or so abused its powers, and sanctioned such a departure or abuse by the trial court that this Court's exercise of its supervisory jurisdiction is warranted.

Livingston Downs' grievance is not that the court of Appeal or the trial court departed from proper judicial proceedings, but that the courts did not depart far enough to find merit in Livingston Downs' arguments that a "Consent Judgment" is not a judgment, and a hearing following notice and service is not a contradictory hearing.

The instant matter comes before the Court following a decision of the Fourth Circuit Court of Appeal AFFIRMING a judgment of the district court granting a motion to dismiss filed by the Racing Commission. The judgment of the trial court was entered after contradictory hearing dismissing with prejudice the matter **Livingston Downs Racing Ass'n, Inc v. La. State Racing Comm'n,** No. 95-15331, Division "J" transferred to "G" c/w Jefferson Downs, Inc et al. v. La. State Racing Comm'n, No. 92-20961 Div. "G" and c/w Livingston Downs Racing

Ass'n v. La. State Racing Comm'n, No. 97-12435, Div. "K" transferred to Div "G".

The issue before the trial court and appealed was whether Livingston Downs submitted to the Racing Commission an application for racing license with a "binding enforceable commitment in an amount not less than TEN MILLION ($10,000.00 [sic]) DOLLARS" per the terms of a consent judgment entered into between the parties on November 15, 1996.

The trial court held, and the court of appeal affirmed, that a "Conditional Commitment For Collateralized Mortgage Financing" purportedly proving financing in a "maximum amount of Ten Million ($10,000,000) Dollars" did not constitute the binding, enforceable commitment in an amount not less than Ten Million ($10,000,000) Dollars required by the consent judgment.

Among its thirteen different assignments of error, Livingston Downs does not challenge this *holding*.

Unless this court reaches an opposite legal determination, relator, Livingston Downs, writ application must be denied.

Because the arguments on application to the Supreme Court vary little from those presented to the appeal court, the Racing Commission attaches hereto and wishes to incorporate herein its Original Brief to the Fourth Circuit. To the extent Livingston Downs extends is [sic] argument beyond that presented on appeal, the Racing Commission submits the following considerations.

ARGUMENT

Livingston Downs assignments of error do not focus on the substantive determination of law, i.e. that the conditional commitment submitted was not the binding enforceable commitment required by the consent judgment, but more the procedures and proceedings, which brought the issue on appeal. It cannot be that both the trial court and the court of appeal erroneously ruled upon the substantive issue without due regard for proper judicial procedure.

Livingston Downs notion of proper judicial procedure would have this litigation extend in perpetuity without ever reaching a final resolution; swirling in an unending cycle of administrative adjudications, appeals and back again.

The Racing Commission entered into the consent judgment with Livingston Downs four years ago to put an end to the dispute.

Livingston Downs now presents that the consent judgment did not put to rest the dispute between the parties, but cleared the way for a whole new process of administrative adjudications, and thereafter, appeals.

These arguments are without merit. The trial court and the court of appeal correctly interpreted and enforced the clear and unambiguous provisions of the consent judgment.

1. Appeal Court Properly *Held* Livingston Downs Failed To Satisfy Terms of Consent Judgment: the "Conditional Commitment"

Livingston Downs was granted an association license in May 1993 to conduct live horse racing. Later in August, it was awarded racing dates to conduct a race meet. After time and when no race track was forthcoming nor any evidence of a race track, the Racing Commission decided to withdraw, revoke and terminate the licenses for failure to fulfill the purpose for which they were granted.

A Petition for Trial De Novo and Suspensive Appeal was filed by Livingston Downs in the 21st Judicial District Court, Livingston Parish, Louisiana appealing the Commission's decision. The matter was transferred to Civil District court and consolidated with a related matter.

The revocation of the license was suspended pending a trial on the merits when the suit was resolved via consent judgment. A copy of the judgment is attached hereto as Exhibit 2. The consent judgment afforded Livingston Downs two (2) additional years to rehabilitate and make itself financially able to fulfill its obligations under the licenses issued to it. Under its terms, Livingston Downs was to re-apply to the Commission for a license to operate a race track on or before October 31, 1998 which application shall include a

> binding enforceable commitment letter(s) in an amount not less than TEN MILLION ($10,000,000) DOLLARS, which provides for the funding of the construction of a racing facility, including a grandstand, racing oval and backside.

Exh. 2, paragraph 6.

On October 30, 1998, Livingston Downs sent via fax an application attached to which was a document entitled *"Conditional* Commitment For Collateralized Mortgage Financing". The document purportedly provided for financing in the "maximum amount of Ten Million ($10,000,000.00) Dollars but was subject to and conditioned upon performance and/or satisfaction of additional terms, provisions and conditions the performance and/or satisfaction of which was based on the "sole and absolute discretion" of the author of the commitment. A copy of the Conditional Commitment is attached hereto as Exh. 3.

Under La.C.C.art. 1770, an obligation dependent upon a suspensive condition the satisfaction of which depends solely on the will of one obligor renders the obligation null. An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. **Willowood Condominium Ass'n, Inc v. HNC Realty Co et al.** 531 F.2d 1249 (5th Cir. 1976).

On appeal, the court affirmed the trial court's determination that the "Conditional Commitment" submitted by Livingston Downs did not satisfy the terms of the November 15, 1996 consent judgment.

Livingston Downs has not assigned as an error this finding. Rather, it accuses the court of "basing its decision on semantics."[2]

Semantics is the study and classification of words or forms viewed as factors in linguistics developments.

---

[2] Livingston Downs, Writ Application, at p. 11.

The court's decision was not based on semantics. The matter is not one of semantics, but one of definition. More importantly, it is a matter of legal distinction. A conditional commitment for a maximum amount of Ten Million Dollars is not a binding enforceable commitment for an amount not less than Ten Million Dollars.

2. Appeal Court Properly Interpreted The Consent Judgment In Order to Reach Its Decision

Though Livingston Downs does not assign as error the court's legal finding that the conditional commitment was not an enforceable commitment required by the consent judgment, it does assign various other errors to the appeal court's interpretation and enforcement of the consent judgment generally. These errors are without merit. The Fourth Circuit as well as the trial court properly interpreted and enforced the express and unambiguous provisions of the consent judgment.

a. Consent Judgment Finally Resolved Initial Dispute Of Revocation

Livingston Downs assigns as an error that the appellate court improperly concluded that the consent judgment rendered moot the issue of whether the Commission properly revoked Livingston Downs' license.

Of course, the appellate court concluded that entering into the consent judgment finally resolved the issues raised by the initial petition. What would the purpose of

the consent judgment be otherwise if not to finally resolve the dispute? If the purpose was to do nothing more than to afford Livingston Downs two additional years there would have been no need for a *Judgment* or for that matter a revocation.

Livingston Downs license was revoked by the Racing commission in an open meeting in August 1994.

Subsequently, Livingston Downs sued the Racing Commission appealing the decision to revoke the license. The suit raised substantive and procedural issues with the revocation, including an allegation that the revocation violated the requirements of the Administrative Procedure Act. These allegations were denied by the Racing Commission.

The matter was postured for trial when the parties jointly agreed to resolve the dispute, as well as settle other disputes, and entered into the consent judgment.

It is clear from the consent judgment that its purpose was to forever put to rest the issues raised by the original petition by mandating that on or before October 31, 1998 a new "application filed by Livingston Downs Racing Association, Inc for a ten (10) year license" would be considered by the Commission.

b. Pertinent Provisions Of The Consent Judgment Were Properly Applied

Livingston Downs further assigns as an error that the appeal court failed to recognize pertinent provisions of the consent judgment.

It is not the courts who ignore pertinent provision of the consent judgment, but Livingston Downs who chooses to select provisions from the judgment and present out of context.

The consent judgment never contemplated that the dispute would return to resolve at the administrative level but specifically provided that district court would retain jurisdiction:

> 18. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party may apply to this Court for a status hearing and this Court shall retain jurisdiction for the enforcement of this Consent Judgment.

The court of appeal correctly reasoned the following:

> By its terms, the consent judgment anticipated three possible conclusions to the litigation: 1) Livingston Downs timely filed an application including the binding, enforceable commitment letter and the Racing Commission approved the application; 2) Livingston Downs failed to file a timely application including a binding, enforceable commitment letter; and 3) Livingston Downs timely filed an application with the binding, enforceable commitment letter but the Racing Commission failed to approve or act upon it. In any of these events, the consent judgment clearly provided for a remedy in district court.

The remedy available to the Commission was provided at paragraph 15 of the consent judgment:

> . . . in the even [sic] that Livingston Downs Racing Association, Inc fails to file an application with a binding, enforceable commitment

> letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including grandstand, racing oval and backside, then these proceedings **shall be dismissed** with prejudice at plaintiff's costs.

The remedy provided to Livingston Downs is found at Paragraph 16 which states:

> . . . in the event an application [per Paragraph 6 with a binding, enforceable commitment letter] is timely filed, but the Commission withholds its approval or acceptance of the funding sources or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc may after October 31, 1998 obtain judicial review of such action by summary proceeding or in a trial de novo or otherwise apply to this Court for appropriate relief.

On appeal, the court correctly recognized that whether the trial court reviewed the application filed by Livingston Downs on motion of the Racing Commission or on petition by Livingston Downs the determination rested with the district court.

Neither the trial court nor the court of appeal could find logic or merit in Livingston Downs contention that the district court could not hear the motion to dismiss filed by the Racing Commission until the Racing Commission considered the application in accordance with the Administrative Procedure Act. The Racing Commission already adjudicated Livingston Downs license which is what inspired the law suit. The Racing Commission

approved the consent judgment resolving the suit in an open meeting all in accordance with the Administrative Procedure Act. The Racing Commission was not required to adjudicate its own adjudication until it reached a decision satisfactory to Livingston Downs. The review of its actions are reserved to the courts.

The issue raised to the trial court by the motion to dismiss was a legal issue, e.g. whether the application and conditional commitment submitted by Livingston Downs complied with the terms of the consent judgment.

If the trial court could not as a matter of law find that Livingston Downs timely submitted an application which included a binding, enforceable commitment letter in an amount not less then Ten Million ($10,000,000) Dollars, then neither could the Racing Commission.

The trial court determined as a matter of law, and the appeal court correctly affirmed, that Livingston Downs did not timely submitted [sic] an application which included a binding, enforceable commitment letter in an amount no less than Ten Million ($10,000,000) Dollars as required by the consent judgment.

A conclusion anticipated and provided for in the consent judgment which required that the case be dismissed.

c. Court Of Appeal Did Not "Rely" On Settlement Agreement

Livingston Downs further assigns as an error that the court of appeal improperly relied upon the settlement agreement which was not properly before the court.

The court of appeal did not rely upon the settlement agreement. Its holding clearly turns on the interpretation and enforcement of the consent judgment.

Livingston Downs graciously acknowledges in its application to the Court that the "intent of the parties regarding the instant litigation is set forth in the consent judgment."

Nonetheless on appeal, it gratuitously referenced matters which were outside the scope of the consent judgment and/or were the subject of the larger settlement. Livingston Downs repeats these references in the instant writ application.

For example, it presents to the Court the excuse that a suit "Terrance Lee Odom v. Livingston Parish Police Jury" on of [sic] the docket of the 21st Judicial District Court, Livingston Parish presented a "serious impediment" to obtaining its financing. The terms of the consent judgment were not contingent upon the resolution of any other pending litigation.

Likewise, Livingston Downs repeatedly remarks upon its suit against individual members of the Racing Commission filed in United States Court, Middle District of Louisiana. This suit was the part of the larger settlement reached between the Racing Commission and Livingston Downs of which the consent judgment represented only a part.

These references made by Livingston Downs both on appeal and on application to the Court are wholly **de hors** the record. If it was Livingston Downs intention on appeal that the court of appeal only and properly restrict

its considerations to the consent judgment, then it should not have referenced matters, suits and settlements which are outside the four corners of the judgment.

2. Trial Court Granted Racing Commission Motion To Dismiss Following Contradictory Hearing

Livingston Downs also assigns as error that the appellate court erred in affirming the decision of the trial court alleging that the trial court did not properly conduct a contradictory hearing. It further contends that the hearing constituted an unlawful adjudication of its license.

The court properly conducted a contradictory hearing on the Racing Commission motion to dismiss.

The Racing Commission filed its motion to dismiss and order to show cause on or about November 10, 1998. The motion was set for hearing on December 4, 1998, and Livingston Downs was served through its counsel of record.

The single issue before the trial court was whether Livingston Downs timely filed an application in accordance with the terms of the consent judgment.

The morning of the hearing Livingston Downs filed a Motion to Enforce Paragraph 16 of the Consent Judgment, exceptions and a writ of mandamus.

The basis of Livingston Downs complaint is not that the motion to dismiss came for hearing without notice or service, but that it was not allowed to respond to the motion to dismiss by arguing the merits of motions and

exceptions which were not properly before the court. This complaint is without merit.

Further, the Court will recall that paragraph 16 of the consent judgment provided that in the event the Racing Commission failed and/or refused to act upon the application submitted by Livingston Downs, then Livingston Downs remedy was to obtain judicial review in district court.

Whether the motion to dismiss was a lawful exercise by the Racing Commission of its remedy under the consent judgment or an act of failure to act upon the application, Livingston Downs remedy enforceable under paragraph 16 was a review by the court.

The trial court reviewed the application. Livingston Downs did not and could not present any evidence that the "Conditional Commitment" included in its application to the Racing Commission satisfied the terms of the consent judgment.

Instead, Livingston downs argued to the trial court and assigns as a [sic] error to the appeal court that the Racing Commission had a [sic] independent obligation to "investigate" the conditional commitment. The consent judgment required Livingston Downs file an application with a binding enforceable, commitment in an amount no less than Ten Million ($10,000,000) Dollars. All other obligations flowing from the judgment were predicated upon the timely receipt of a valid application. Both the trial court and the court of appeal correctly rejected, with good reason, the inane proposition that the Racing Commission was obliged under the consent judgment to

investigate a commitment that was unenforceable for an amount less than Ten Million ($10,000,000) Dollars.

3. Appeal Court Correctly Ruled Upon The Issue Before It With Benefit of All Relevant Documents

Finally, Livingston Downs assigns among its errors that the court [sic] appeal court erred in affirming the trial court's decision because the record was grossly incomplete and/or inaccurate.

First, the Court of Appeal correctly found that the issues raised by the original suit were laid to rest by the Consent Judgment.

Thus, the only relevant issue on appeal was a de novo review of the consent judgment and the application filed by Livingston Downs with attachments. These documents were properly before the court.

Livingston Downs presents that it filed three separate motions to order the Clerk of Court to complete the record on appeal contending that the record was never completed.

Livingston Downs does not tell the Court that the entirely of the record might have been returned to the Court of Appeal from the Civil District Court but for Livingston filing a Motion to Limit the Record on Appeal.

Considering the number of consolidated matters and piecemeal appeals, it is virtually imprudent of Livingston Downs not to confirm that the record returned is the record on appeal. But, Livingston Downs did not consider

the record on appeal sufficiently important to confirm the return of record before filing its brief.

Rather, it was counsel for the Racing Commission who brought to the attention of the Clerk of Civil District Court, Clerk of the Fourth Circuit Court of Appeal and counsel for Livingston Downs that the record returned to the court of appeal was not complete. **See** Letter attached as Exh. 4. Having reviewed the record at the trial court, it was apparent that the record was there but parts were inadvertently left out when returned to the appeal court.

Rather than working directly to resolve the issue, Livingston Downs seized upon it as an opportunity to delay the appeal proceedings filing multiple extensions of time to file a reply brief and seeking to postpone oral argument.

Now, it endeavors to exploit its own imprudence as a means to set aside the decision on appeal.

At the time the matter was submitted for decision to the Fourth Circuit Court of Appeal, it had before it all relevant documents to the issues on appeal.

CONCLUSION

For the foregoing reasons, the Racing Commission respectfully opposes Livingston Downs writ application to the Supreme Court requesting it exercise is [sic] supervisory jurisdiction.

Respectfully submitted:

RICHRD [sic] P. IEYOUB
Attorney General

By: /s/ Kim Raines Chatelain
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Attorney for State of Louisiana, Racing Commission

Exhibit 4

[Names And Addresses Omitted In Printing]

(LOGO)

Louisiana State Racing Commission

August 9, 1999

Hon. Danielle A. Schott
Fourth Circuit Court of Appeal
1515 Poydras Street, 7th Floor
New Orleans, Louisiana 70112

Hon. Dale Atkins
Clerk of Civil District Court
421 Loyola Avenue
New Orleans, Louisiana 70112

Ms. Darlene S. Ransome, Esq.
5353 Florida Blvd.
Baton Rouge, Louisiana 70806

VIA FAX AND POST
(225) 928-2938

RE Livingston Downs v. La. State Racing Commission **CDC, No. 95-15331, Div "J"**, c/w No. 92-20961, c/w No. 97-12435
4th CCA No. 99-CA-1001

Dear Hons. Schott and Atkins and Ms. Ransome:

The Racing Commission is appellee in the above referenced appeal.

In an abundance of caution and with all candor to the court and appellant, I writ [sic] to notify that the record returned to the court of appeal is not the record designated for return. Attached you will find a copy of pleadings returned. You will note that only the last three entries relate to case appealed. All other pleadings relate

to a matter on the docket of Civil District Court designated No. 92-20961.

Livingston Downs appeals a judgment dated December 11, 1999 on the docket of Civil District Court designated No. 95-15331. A motion and order was entered limiting the record on appeal to Civil District Court No. 95-15331 only.

Pleadings filed in No. 95-15331 which were not properly returned to the Court of Appeal include by way of example:

(1) Original Petition (filed in 21st JDC and transfered to CDC)
(2) Motion to Consolidate
(3) Answer
(4) Trial Order
(5) Consent Judgment

Exceptions, Motion for Writ, and others.

This matter as well as the consolidated matters Nos. 92-20961 and 97-12435 have previously been before the court [sic] appeal on various appeals and writs. Thus, these pleadings would ordinarily be available to the court of appeal for review in the present matter. However, I am informed that the Fourth Circuit has only the present appeal record in its court. Originals from prior appeals have been returned to Civil District Court.

Civil District Court maintains the record reflected by the attached document in an "appeal" file (red). It also maintains two other "appeal" files (blue). It appears from a review of all three files that pleadings filed into CDC

No. 95-15331 are contained in all three "appeal" files mixed with pleadings filed in CDC No. 97-12435.

Appeals clerk at Civil District Court, Celeste, advises that the record returned to the Court of Appeal was the record designated. However, she also states that all pleadings in consolidated matters are filed into the lowest number.

The record returned was not the record designated because the record designated was all pleadings relating to No. 95-15331. Those pleadings were not returned.

I am informed that Civil District Court will compile the contents of the two other "appeal" files (blue) and return them to the Court of Appeal as an "exhibit."

This is an appeal from a final judgment dismissing case No. 95-15331, Civil District Court. The matter cannot properly be adjudicated without the entire record properly before the court.

Sincerely,

/s/ Kim Raines Chatelain
KIM RAINES CHATELAIN

enclosure

cc: Mr. Albert Stall, Chairman
Legal Committee

KRC/mmi

APPENDIX G

[Exhibits Omitted In Printing]

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NOS.92-20961 c/w
95-15331

DIVISION "G" DOCKET:

SECTION "11"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

versus

LOUISIANA STATE RACING COMMISSION

* * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MAY IT PLEASE THE COURT:

The defendant, **LOUISIANA STATE RACING COMMISSION,** has filed a Motion to Dismiss the above captioned and numbered proceeding pursuant to the order of this court set forth in a Consent Judgment signed by all parties on November 15, 1996. This memorandum is submitted in support of the Motion to Dismiss.

The captioned matter has its genesis in a decision made by the Louisiana State Racing Commission ("Racing Commission") on August 29, 1994 to withdraw, revoke and terminate a ten (10) year license issued on May 27, 1993 to Livingston Downs Racing Association, Inc. ("Livingston Downs") and a license and/or permit issued on August 26, 1993 to conduct a live race meet.

The Commission's decision was appealed to this court by instituting the captioned suit wherein Livingston Downs alleged among other grievances that the Racing Commission withdrew, revoked and terminated Livingston Downs licenses and/or permits without just cause. The Racing Commission answered the suit by averring that it had just cause for its actions because of Livingston Downs' (1) continued failure or inability to meet its financial obligations connected with fulfillment of the purposes for which its license(s) were issued, including but not limited to the failure and inability to expend the sum of not less than $10,000 each year for foreseeable future improvements to the track and its facilities; (2) material false statement to the commission; (3) and intentional falsification and/or intentional misstatement of material fact in an application for racing privileges.

Only after extensive and exhaustive litigation and negotiation, the Racing Commission and Livingston Downs entered into a Consent Judgment in November 1996. The Consent Judgment provides that the licenses issued to Livingston Downs shall be suspended and the Racing Commission shall not except as provided in the Consent Judgment be required to consider Livingston Downs as a licensed racing association. The Consent Judgment further provided the following:

1. that the Racing Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish;

2. that any application for permits or license to be issued to Livingston Downs Racing Association, Inc., shall conform to the provisions of La.R.S. 4:158 and 4:147(4)(a) through (g) and 147(5)

3. that any application for permits or license to be issued to Livingston Downs Racing Association shall include within the application **"binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS"** which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside;

4. the commitment must issue from source suitable to and acceptable to the Commission, after prompt investigation.

On October 30, 1997 the Racing Commission received via fax the following documents:

1. an application by Livingston Downs Racing Association, *L.L.C.* (not Livingston Downs Racing Association, Inc.) for racing license;

2. Financial Statement of Livingston Downs Racing Association, *L.L.C.*;

3. Balance Sheet of Livingston Downs Racing Association," *Inc.*

4. Conditional Commitment for Collateralized Mortgage Financing, by Remington Financial Group, Inc. to applicant Mr. Al J. Ransome, Livingston Downs Racing Association, *Inc.*. **See** Exhibit 1, **in globo.**

The Conditional Commitment for Collaterlized Mortgage provides that the Commitment is not valid unless a

copy of such Commitment is dated, signed by Borrower and Lender, and returned on or before November 10, 1998. The documents received by fax on October 30, 1998 did not have attached thereto any signature page for the Conditional Commitment. An original application and a copy of the Commitment with the signature page was later received via federal express on Monday, November 1, 1998. The Commission is not in possession of any document which would confirm or refute whether the Commitment was timely returned with signatures to the named lender.

Livingston Downs Racing Association, Inc. has failed to satisfy the terms and conditions of the Consent Judgment in the following particulars:

1. The Conditional Commitment for Collateralized Mortgage Financing is not a binding and enforceable commitment in an amount not less than Ten Million ($10,000,000.00) Dollars;

2. The Conditional Commitment allows for ownership in Livingston Downs Association, L.L.C. by unknown persons at the sole discretion of Remington Financial Group, Inc. subordinating the Racing Commission regulatory authority under La.R.S. 4:147(4) to that of another.

3. The application for license was not made by Livingston Downs Racing Association, Inc. now known as ALDAR, Inc. but by Livingston Downs Racing Association, L.L.C. a separate and distinct legal entity from the party to this suit.

1. Failure To Obtain Binding, Enforceable Loan Commitment

The document entitled **"Conditional Commitment For Collateralized Mortgage Financing"** made a part of the application by Livingston Downs, L.L.C. purportedly provides for financing in the "maximum amount of Ten Million ($10,000,000.00) Dollars but is subject to and conditioned upon performance and/or satisfaction of additional terms, provisions and conditions the performance and/or satisfaction of which is based on the **"sole and absolute discretion of Remington Financial Group, Inc."**. These terms and conditions include by way of example:

1. "[t]he loan amount ("Loan") will be in the principle amount of $10,000,000. Said loan amount shall not exceed 80% of subject property's Fair Market Value.

2. "[t]his Loan commitment is contingent on Borrower having the capability, **in its sole discretion** of Lender, of servicing and repaying of Loan in accordance with its terms";

3. "[a]t and in all events, this Loan commitment is subject to Lender's approval **in its sole discretion** of all necessary documentation relating to Borrower, Project and Collateral;

First, the Conditional Commitment is not enforceable as it is replete with suspensive conditions the satisfaction of which is wholly contingent on the sole discretion of lender, Remington Financial. La.C.C. art. 1770 provides that a suspensive condition that depends solely on the will of the obligor makes the obligation null.

An enforceable contract must be sufficiently certain to define the nature and extent of the parties' obligations. **Willowood Condominium Association, Inc., et al v. HNC Realty Company et al,** 531 F.2d 1249 (5th Cir. 1976). The **Willowood** court found that a 4.7 million dollar loan commitment is not a casual endeavor but an enterprise carefully entered into by each party. In that case, there was no delineation of essential elements of a loan including failure to set forth with specificity how and when interest on the loan would be adjusted or paid, how and when disbursements would take place or a mortgage. Further, the purported commitment letters implied there would be further negotiations which would take place. Here, the court held that a letter setting forth terms upon which a loan to developers would be made subject to approval of a loan committee which failed to include essential terms of a loan was not an enforceable loan commitment. (**Willowood,** at 1252) (citing **Wheeler v. White** 385 S.W.2d 619 (1964), rev'd on other grounds, 398 S.W.2d 93 (1965) holding that a loan commitment which provided the principal amount of loan, interest, and term but failed to provide amount of monthly payments was unenforceable.)

The Conditional Commitment provided by Livingston Downs is likewise nothing more than a letter setting forth terms upon which a loan may be made but is not in and of itself an enforceable loan commitment. There is no funding date specified; while the term of the note may be set at 60 months, there is no monthly payment set forth; rate of interest is not set forth with specificity; there is no commitment fee paid which is evidenced by the writing; and it implies the need for

substantial further negotiation as the writing is entirely subject to the discretion of the lender or investors the author of the commitment may find.

Next, the Consent Judgment required a binding, enforceable loan commitment of not less than Ten Million ($10,000,000) Dollars. The "loan commitment" provided is not for an amount not less than Ten Million ($10,000,000) Dollars but for an amount not to exceed Ten Million Dollars providing the fair market value of the project is worth at least Twelve Million Five Hundred Thousand ($12,500,000) or 80%.

2. Ownership Participation By Unknown Persons

Secondly, the Conditional Commitment allows for ownership in the "project" by unknown persons at the sole discretion of Remington Financial Group, Inc.:

1. "15% net cash flow, profit participation and ownership of the project shall go to RFG, which interest shall begin upon principal and interest repayment, provided said participation generates a 25% minimum annual I.R.R."

2. "Borrower is advised that RFG shall assign the contemplated financing herein to its investor that may have one or more participants, owning rights in the loan, or co-lenders, either at loan closing or at any time thereafter."

3. " . . . Borrower shall also pledge 100% of available stock of Borrowing entity until all principal and interest is repaid."

Paragraphs 7, 8 & 11, Conditional Commitment.

La.R.S. 4:147 (4) requires each applicant seeking license as a racing association to set forth the names of the stockholders and directors of the corporation.

The Conditional Commitment implies that RFG and/or subsequent unknown investors will have an ownership interest in the "project" as a condition of financing. When, where, how and in what form this interest may manifest itself is unknown and undisclosed to the Racing Commission at this time. However, in any event such a condition inevitably subordinates the Racing Commission's regulatory authority under La.R.S. 4:147 to that of the financier of the "project".

3. Application By Livingston Downs Racing Association, L.L.C.

The terms of the Consent Judgment provided that the Racing Commission shall consider an application filed by **"Livingston Downs Racing Association, Inc."** for a ten (10) year license to operate a race track in Livingston Parish.

Livingston Downs Racing Association, Inc. did not make application to the Racing Commission for a ten year license. Rather, Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity not previously licensed by the Racing Commission, made application to the Commission. **See,** Exh. 1 **in globo.**

Livingston Downs Racing Association, Inc. is a Louisiana corporation formed in October 1992 by Al Ransome who is registered agent and president. There were no other officers or directors. The licenses and permits at

issue in this litigation were granted to Livingston Downs Racing Association, Inc.

In October 1998, Livingston Downs Racing Association, Inc. changed its name to ALDAR Investments, Inc. **See** Exh. 2, **in globo.**

At or about the same time, Darlene S. Ransome now acting as agent for ALDAR, Inc. formerly known as Livingston Downs Racing Association, Inc. formed Livingston Downs Racing Association, L.L.C., a separate and distinct legal entity. The limited liability company articles of incorporation are signed by Darlene Ransome and Al Ransome for Livingston Downs Racing Association, L.L.C. **See** Exh. 2, **in globo.**

Livingston Downs Racing Association, L.L.C., not plaintiff herein, makes application to the Racing Commission for license. However, the limited liability company attaches to its application Livingston Downs Racing Association, Inc. income statement and balance sheet. According to its balance sheet, Livingston Downs Racing Association, Inc. holds approximately $1 million in assets but $2 million in liabilities. **See** Exh. 1, **in globo.**

Livingston Downs Racing Association, L.L.C. has a zero net worth.

Livingston Downs represents to the Commission that these alterations were necessary because potential lenders expressed their desire to do business with a limited liability company rather than a corporation. **See** Letter of Darlene Ransome, Exh. 2.

However, the Conditional Commitment is made to applicant, Al J. Ransome and Livingston Downs Racing Association, Inc.

It is not certain or clear the need for participation and alteration of corporate forms or the addition or subtraction of officers, directors or managers.

It is clear that Livingston Downs Racing Association, Inc. has not complied with the terms of the Consent Judgment and has in fact submitted no application.

CONCLUSION

It has been five years since Livingston Downs Racing Association, Inc. has first received a license to conduct live racing. Livingston Downs has had two years since the Consent Judgment suspending and/or ending litigation between itself and the Racing Commission. Still, there is no race track and no evidence of improved financial ability to construct one. The Conditional Commitment is a conditional commitment and not an enforceable, binding loan commitment for an amount not less than ten million dollars. Livingston Downs has failed to satisfy the terms and conditions of the Consent

Judgment, and pursuant to the judgment this matter should be dismissed with prejudice at plaintiff's costs.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
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KIM RAINES CHATELAIN,
LSBA #21525
4224 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 599-0733
Telefax: (504) 586-0065
Attorney for Racing Commission

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon Counsel for all parties by telefacsimile transmission and/or by mailing the same to each properly addressed and postage prepaid on 11-10-98, 1998.

/s/ Kim Raines Chatelain

APPENDIX H

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 92-20961 **DIVISION "G"**

JEFFERSON DOWNS, INC., ET AL.

VERSUS

LOUISIANA STATE RACING COMMISSION

consolidated with

NO: 95-15331 **DIVISION "J"** **SECTION 13**
transferred to "G"

LIVINGSTON DOWNS RACING ASSOCIATION, INC.

VERSUS

LOUISIANA STATE RACING COMMISSION

OPPOSITION TO MOTION TO DISMISS

MAY IT PLEASE THE COURT:

I. Background

NOW INTO COURT, through undersigned counsel, comes Livingston Downs Racing Association, Inc. ("LDRA"), plaintiff in the above entitled and numbered cause, appearing herein in opposition to the Motion to Dismiss filed by defendant, Louisiana State Racing Commission ("Commission"), respectfully represents that on November 15, 1996 the parties and this court entered into a consent judgment which provides in pertinent [sic]:

> 6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application for permits or licenses to be issued to Livingston Downs Racing Association, Inc., which applications are filed on its own behalf and shall conform to the provisions of La. R.S. 4:158 and

4:147(4)(a) through (g) and 147(5), shall include within the application binding, enforceable commitment letter(s), in an amount not less than TEN MILLION ($10,000,000.00) DOLLARS, which provides for the funding of the construction of the racing facility, including a grandstand, a racing oval and a backside, on the timetable as set forth hereinafter.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commitment letter(s) shall issue from a source or sources suitable to and acceptable to the Commission, after prompt investigation, which may include utilization of the Racing Investigations Unit of the Louisiana State Police as well as its own staff and consultants, and in which investigation Livingston Downs Racing Association, Inc., its owners and management shall fully cooperate.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana State Racing Commission, upon completion of its investigation, shall promptly act upon the application and shall not unreasonably withhold its approval or acceptance of the funding source(s).

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon its approval of the funding source(s), as well as the moral and financial qualifications of any partners, shareholders, officers and officials of Livingston Downs Racing Association, Inc. other than Al J. Ransome, then the Louisiana State Racing Commission shall issue to Livingston Downs Racing Association, Inc. a ten year license to operate a racetrack as provided by law and shall approve an application for live race meetings for a period by law and shall approve an application

for live race meetings for a period not exceeding three racing years, and shall lift the suspension of the ten year license which issued on May 27, 1993.

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event an application is timely filed, but the Commission withholds its approval or acceptance of the funding source(s) or otherwise refuses to issue the ten year license, or otherwise refuses to act upon the application in a prompt manner, then Livingston Downs Racing Association, Inc. may after October 31, 1998, obtain judicial review of such action by summary proceedings or in a trial de novo or otherwise apply to this Court for appropriate relief.

At the time that the consent decree (a copy of which is attached as Exhibit "A") was entered into by and between the parties and the court, this case was on remand to Judge Giarrusso, Division "G", Civil District Court, Parish of Orleans by virtue of writs of certiorari issued by the Fourth Circuit Court of Appeal, State of Louisiana. The Fourth Circuit reversed and set aside Judge Giarrusso's ruling dismissing LDRA's suspensive appeal from the Commission's ruling and remanded the case to the trial court for proceedings in accordance with LSA-R.S. 9:158. The Fourth Circuit further recalled Judge Giarrusso's stay order of May 23, 1996. Therefore, LDRA's suspensive appeal was in effect and the action of the Commission revoking LDRA's license was reversed. The consent judgment was entered into in order to attempt to resolve the issue of LDRA's license revocation by the Commission.

If the parties had not entered into a consent judgment then the case would have proceeded to trial in Judge Giarrusso's court on the merits.

On August 18, 1998 Terrence Lee Odom dismissed with prejudice his pending appeal in the matter entitled "Terrence Lee Odom v. Livingston Parish Police Jury," Suit No. 68,130, Division "F," 21st Judicial District Court, Livingston Parish. This suit constituted a serious impediment to LDRA obtaining a financing commitment because this litigation attacked the local election in Livingston Parish which was and remains the foundation of the authorization of horse racing in Livingston Parish. A copy of the dismissal order signed by the First Circuit Court of Appeal is attached hereto as Exhibit "B".

As soon as the dismissal was ordered, LDRA sent a written request to Commission for an extension of the October 31, 1998 deadline contained in the Consent Decree. (Exhibit "C").

On September 17, 1998 the Commission advised Mr. Jude Bursavich, counsel for LDRA, that the Commission was presently scheduled to hold a meeting in Bossier City on September 26, 1998. The letter further informed Mr. Bursavich that LDRA had not been placed on the agenda of the Commission's September 26, 1998 meeting. However, the Commission was expected to adjourn to executive session to discuss pending litigation which would include LDRA's request for modification of the consent judgment by extension of the October 31, 1998 deadline. (Exhibit "D"). A meeting notice was forwarded to Mr. Bursavich. (Exhibit "E").

The Commission purportedly held the meeting on Saturday, September 26, 1998. On information and belief, the Commission adjourned into executive session at which time LDRA's request for extension of the deadline was purportedly discussed. However, the Commission did not formally resume its open meeting and conduct a vote in open meeting upon the action, if any, it advocated in executive session. The Commission did not issue any formal ruling of its action. This is in violation of the Administrative Procedure Act.

The Commission has failed to produce any transcript of the September 26, 1998 meeting allegedly held by it and has failed to issue any formal ruling by vote of the full commission on the LDRA request for an extension. On September 23, 1998 Mr. Victor Sachse, III, counsel for LDRA, issued a letter to the attorney for the Commission and forwarded several documents to the Commission for its consideration at its September 26, 1998 meeting. (Exhibit "F"). LDRA did not receive any notification of the Commission's actions until October 22, 1998 and this was only after counsel for LDRA on October 5, 1998, sent correspondence requesting notification by the Commission. (Exhibits "G" and "H," respectively) On Friday, October 30, 1998 at 9:35 a.m. LDRA hand delivered a commitment to the Commission office in New Orleans, Louisiana. (Exhibit "I"). LDRA did not receive any communication whatsoever from the Commission regarding the sufficiency or insufficiency of the commitment it presented. The Commission did not hold an open meeting to accept or reject said commitment. Instead, the Commission arbitrarily and capriciously rejected said commitment without even communicating with the lender or

LDRA. The action of the Commission is in direct violation of the Administrative Procedure Act, is in bad faith and violates the spirit of the consent judgment and violates LDRA's due process rights under Article I Section III of the Louisiana Constitution of 1974.

Then, on November 10, 1998 the Commission filed a motion and order to show cause why its motion to dismiss filed in the instant case should not be granted. Although LDRA has five counsel of record listed in this action, counsel for the Commission forwarded a copy of its motion only to Mr. Sachse which was not received in his office until November 13, 1998. The Commission received LDRA's commitment letter timely. However, the Commission has not even acknowledged receipt of said commitment or advised LDRA or its lender as to any problems it may perceive with said commitment. LDRA's lender, Remington Financial Group, Inc. ("RFG"), on November 18, 1998 advised the Commission "that our firm is prepared and willing to make certain modifications or changes to the commitment, provided the overall integrity of the document remains intact." (Exhibit "J"). This communication was provided by Mr. Matthew E. McManus, Partner of RFG. The Commission simply, in bad faith, breached its agreement with LDRA and therefore, the case should be reinstated before this Court.

On November 18, 1998 Claude F. Reynaud, Jr., counsel for LDRA filed a motion to continue the hearing on the defendant's motion to dismiss. The court sent no formal notification to counsel for LDRA as to whether the motion had been granted or denied. Counsel for LDRA attempted to contact Judge Giarrusso's docket clerk on Monday, November 30, 1998 and was advised that said

clerk was ill and was advised to leave a message. On the morning of Tuesday, December 1, 1998 counsel for LDRA again contacted Judge Giarrusso's office and was advised by "Pete" that the judge remembered denying said motion. Counsel for LDRA requested a copy of the denial and was informed that it could not be located. However, the court did graciously extend LDRA's time to file its opposition by one day and allow it oral argument.

II. Law and Argument

A. The motion to dismiss is not properly before the Court.

The settlement agreement, which is the subject of the motion to dismiss is a contract between the plaintiff and the defendant in the form of a consent judgment, which was approved by the Commission in open meeting in compliance with the statutes.

The Commission's actions are governed by the Administrative Procedures Act and by LSA-R.S. 42:6, the open meetings law. There exists no authority for the Commission's attorney or the Commission's chairman to unilaterally take action on behalf of the Commission without first having the matter heard by the full Commission and a vote taken on the subject matter. There is no record of this matter being heard in open meeting, therefore, there is no legally authorized motion before this Court.

B. The allegations of fact to support the motion to dismiss were determined by parties not authorized to act and were developed in violation of the Administrative Procedure Act.

The underlying purpose of the Commission's actions are to finally revoke all licenses issued by the Commission to the plaintiff. Clearly, the allegation of defendant's motion constitutes a finding of fact and the motion to dismiss is clearly an adjudication.

The procedures to be followed in an adjudication are outlined in LSA-R.S. 49:955. In *Tafaro's Inv. Co., Inc. v. Division of Housing, Inc.*, 261 La. 183, 259 So.2d 57 (1972) the court wrote:

> Where administrative agency adjudicates private property rights and obligations, parties must be afforded an opportunity to be heard, and, if private rights cannot otherwise be protected and there is no compelling public interest for summary action, there must be a full hearing before administrative actions.

Here, the Commission made absolutely no attempt to comply with the law and there is no compelling public interest to rush to judgment.

C. The Commission failed to follow LSA-R.S. 49:961 in dealing with the matter of the revocation of a license.

In addition to the statutory requirements of LSA-R.S. 49:955, in the matter of a license application, LSA-R.S. 49:961 imposes special conditions. More specifically, R.S. 49:961(C) reads in pertinent part:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, *prior* to the institution of agency proceedings, the agency gives notice to the licensee of facts or conduct which warrants the intended action, *and the licensee is given the opportunity to show compliance with all lawful requirement for the retention of the license.* (Emphasis ours.)

In *La. State Board of Medical Examiners v. Bertucci*, 598 So.2d 798 (La. App. 4th Cir. 1992), the court wrote:

> Though under Administrative Procedure Act, notice and opportunity to be heard are required in any adjudication proceeding, *additional step* is required with respect to suspension, revocation, annulment or withdrawal of an existing license, whereby agency must give licensee an opportunity, *prior* to institution of formal proceedings, to show that the actions complained of do not violate the law or agency rules.

Here, LDRA in a good faith effort to comply with the consent decree, filed an application to reinstate its license and provided the Commission with a commitment for $10 million in financing. Without contacting or advising LDRA, or its lender, unknown persons acting without authority, flatly rejected LDRA's application and arbitrarily and capriciously declared that the commitment letter was not binding and enforceable. Subsequent to learning of the Commission's actions, LDRA's lender, RFG wrote to the Commission and offered to amend the commitment to meet the arbitrary objections to the commitment. (See Exhibit "J").

III. Conclusion

The Commission did not properly perform its duties according to statute and in good faith. This motion is improperly before the court and should be denied.

It is clear from the series of events and documentation provided that Section 16 of the consent judgment is applicable and that plaintiff LDRA, not defendant, is entitled to seek appropriate relief before this Court. The Commission, in bad faith, breached its agreement with LDRA and therefore, this case should be reinstated before this Court.

Respectfully submitted:

RANSOME LAW FIRM, L.L.C.

/s/ Darlene S. Ransome
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Jude C. Bursavich, Bar Roll #19303

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on opposing counsel by facsimile and by placing same in the United States mail, postage prepaid and properly addressed this 1st day of December, 1998.

/s/ Darlene S. Ransome
Darlene S. Ransome

APPENDIX I

SETTLEMENT AGREEMENT

Livingston Downs Racing Association, Inc. (hereinafter "Livingston Downs") and Louisiana State Racing Commission hereinafter "the Commission") hereby agree to settle certain litigation affecting Livingston Downs, the Commission and in some instances present or past Commissioners on the following basis to-wit:

1. The parties agree to obtain a consent decree in the matter entitled "Livingston Downs Racing Association, Inc. versus Louisiana State Racing Commission," No. 92-20961 c/w 95-15331, Civil District Court for the Parish of Orleans in the form annexed as *Appendix A*.

2. Monetary matters between the Commission and Livingston Downs will be resolved as follows:

a. Livingston Downs v. State, No. 430,936, 19th Judicial District Court, shall be dismissed with prejudice.

b. Twelve Thousand Five Hundred and No/100 ($12,500.00) Dollars out of various deposits made by Livingston Downs with the Commission shall be returned.

c. Costs and attorneys' fees assessed against the Commission in various interlocutory orders and judgments in Livingston Downs Racing Association v. Edwin Edwards, et al., No. 399,563, 19th Judicial District Court, including the interlocutory appeal to the First Circuit, No. 94-CA-1514, shall be released. However, any costs and attorneys' fees assessed in the final judgment therein rendered on July 15, 1996 or as the same may be modified by the trial court or the court of appeal or other court are

not affected by this release. The forms of release are annexed as *Appendix B.*

d. The Commission's rule to show cause to Livingston Downs with respect to minimum license fees shall be dismissed on joint motion in the form annexed as *Appendix C.* The refund therein provided shall be part of the sum provided for in b above. Livingston Downs shall withdraw its application for 1996-97 race dates.

e. No other monetary matters remain open.

3. Livingston Downs Racing Association v. Jefferson Downs, et al., No. 96-3430-A-Ml, United States District Court, Middle District of Louisiana, shall be dismissed with prejudice insofar as against all present and past Commissioners, including but not limited to those named as follows Albert Stall, Oscar Tolmas, Payton Covington, W. C. Littleton and James Ben Thomas and as against Melinda Tucker.

4. Livingston Downs Racing Association v. Krantz, et al., No. 68,605, 21st Judicial District Court, Parish of Livingston, shall be dismissed with prejudice as to Oscar J. Tolmas.

5. Livingston Downs shall release all present and past Commissioners as provided in paragraph 3 hereinabove to all matters adverse to Livingston Downs through November 11, 1996, *Appendix D.*

6. The Commissioners' audit of Livingston Downs is deemed concluded and no further action will be taken with respect thereto.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement this 15th day of November, 1996.

LIVINGSTON DOWNS
RACING ASSOCIATION, INC.

/s/ Susan Plauche

BY: /s/ Al J. Ransome

/s/ Paul Bonin

LOUISIANA STATE RACING
COMMISSION

BY: /s/ Albert M. Stall